No. 90-1010

Supreme Court, U.S.
FILED
DEC 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

JOHN J. DILLON III and ROBERT D. HAASE,

Petitioners,

v.

ALLEGHANY CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is vacation of a decision reversing a final judgment dismissing a complaint on abstention grounds and affirming an interlocutory order refusing to abstain in a parallel proceeding required where both proceedings are mooted by actions of parties other than the states urging abstention, thereby precluding those states from seeking writs of certiorari?

LIST OF PARTIES

The parties to this action are John J. Dillon III, Commissioner of the Indiana Department of Insurance, Robert D. Haase, Commissioner of Insurance for the State of Wisconsin, Alleghany Corporation, St. Paul Companies, Inc., St. Paul Fire and Casualty Insurance Company and St. Paul Indemnity Company.

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No. _____

In The

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October Term, 1990

JOHN J. DILLON III and ROBERT D. HAASE,

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Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioners, John J. Dillon III, Commissioner of the Indiana Department of Insurance and Robert D. Haase, Commissioner of Insurance of the State of Wisconsin, respectfully request that a writ of certiorari issue to review July 19, 1990 and July 23, 1990 orders of the Seventh Circuit Court of Appeals refusing their respective requests to vacate that court's judgment and decision in *Alleghany Corp. v. Haase*, 896 F.2d 1046 (7th Cir. 1990) and all prior judgments, orders and decisions in that consolidated proceeding.

OPINIONS BELOW

The orders from which review is sought are reprinted in their entirety in the appendix (A-1, A-3).

The district court in Indiana issued a memorandum decision and interlocutory order denying Indiana's motion to abstain (A-118), and then certified that order for immediate appeal (A-116). *Alleghany Corp. v. Eakin*, 712 F. Supp. 716 (S.D. Ind., 1989). Accepting the recommendation of the magistrate, the district court in Wisconsin granted Wisconsin's motion to dismiss on abstention grounds, and issued a final judgment accordingly (A-33, A-35). *Alleghany Corp. v. Haase*, 708 F. Supp. 1507 (W.D. Wis. 1989).

The seventh circuit issued an order consolidating Alleghany's appeal from the final judgment in Wisconsin and the appeals of Indiana and St. Paul from the interlocutory order in Indiana (A-28). On February 21, 1990, it affirmed the Indiana interlocutory order and reversed the Wisconsin final judgment (A-5). *Haase*, 896 F.2d at 1046-1056. On April 5, 1990, it issued a separate opinion denying Indiana's petition for rehearing and suggestion of rehearing en banc (A-132). *Haase*, 896 F.2d at 1056-57. The orders from which review is sought were issued in response to the July 16, 1990 request of Indiana and the July 19, 1990 request of Wisconsin to vacate the entirety of the seventh circuit's judgment and decisions in *Haase* as well as all prior judgments, orders and decisions in that case. (A-140, A-143).

The district court in Indiana subsequently dismissed that action as moot on July 12, 1990 (A-115). The district

court in Wisconsin dismissed that action as moot on July 19, 1990 (A-31).

JURISDICTION

The orders from which review is sought were issued on July 19, 1990 and July 23, 1990. Although no rehearing was requested concerning those orders, rehearing concerning the seventh circuit's February 21, 1990 decision was sought by Indiana and denied on April 5, 1990 (A-132). *Haase*, 896 F.2d at 1056-57.

Pursuant to Supreme Court Rule 30.3, Justice Stevens issued an order granting petitioners an extension of time through December 16, 1990 to file a petition for a writ of certiorari. *John J. Dillon, III, Commissioner, Indiana Dept. of Insurance, et al. v. Allĕghany Corporation*, No. A-266 (October 5, 1990). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Art. III § 2:

> The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more

States, between a state and citizens of another state, between citizens of different States, between citizens of the same state claiming lands under grant of different States, and between a state, or the citizens thereof, and foreign States, citizens or subjects.

28 U.S.C. § 2106:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

In an effort to acquire St. Paul, Alleghany commenced related actions in Indiana and Wisconsin challenging the insurance takeover statutes of those states, Ind. Code §§ 27-1-23-1 *et seq.;* Wis. Stats. §§ 600.03(13), 611.72, 617.11(1), asserting jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). The motions of Indiana and Wisconsin requesting each district court to dismiss those actions on abstention grounds culminated in the seventh circuit's decision in the consolidated appellate proceeding holding that abstention is not required. *Haase,* 876 F.2d at 1046.

At some point during the pendency of the seventh circuit proceedings, Alleghany and St. Paul commenced

negotiations to resolve the legal dispute created by Alleghany's effort to acquire St. Paul (A-141). The record contains no suggestion that the seventh circuit, Indiana or Wisconsin was advised of the pendency of those negotiations. The settlement was made public on or about May 29, 1990 (A-141). It required St. Paul to pay approximately $260 million for 4.4 million of shares of St. Paul stock that had been acquired by Alleghany at a total cost of approximately $230 million (A-141). In addition, it required St. Paul to reimburse Alleghany up to $5 million in expenses and to stop all litigation (A-141).

Alleghany subsequently sought stipulations of dismissal on the grounds that its challenges to the states' insurance takeover laws had become moot (A-135). Indiana signed such a stipulation, but Wisconsin did not (A-135, A-140). Both district courts ultimately dismissed Alleghany's actions as moot, without determining the validity of the takeover statutes involved (A-31, A-115).

Upon being approached by Alleghany, Indiana and Wisconsin each requested the seventh circuit to vacate its decision on the basis that there was no remaining case or controversy between the parties, and that the actions had become moot (A-135, A-140). Alleghany opposed vacation on the theory that an opinion is a public act and that only the vacation of final judgments is required when a case has become moot (A-143). Prior to the receipt of Alleghany's opposition, the seventh circuit denied Indiana's request to vacate, citing only its decision in *In Re: Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299 (7th Cir. 1988) (A-3). It then summarily reaffirmed that order in denying Wisconsin's separate request to vacate (A-1).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL REQUIRING VACATION IN CASES THAT HAVE BECOME MOOT.

It is the duty of a federal court to vacate the judgments, orders and decisions that have been issued in a case that has become moot because U.S. Const., Art. III § 2 limits federal judicial power to specified cases and controversies. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Moot cases no longer present live controversies, and federal courts therefore have no jurisdiction to decide them:

> Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants. . . . It is not enough that a controversy existed at the time the complaint was filed, and continued to exist when review was obtained in the Court of Appeals. . . . In the case now before us, respondents state that they no longer seek any equitable relief in federal court. Because there no longer is a live controversy between the parties over whether a federal court can hear respondents' equitable claims, the first question on which certiorari was granted is moot.

Deakins v. Monaghan, 484 U.S. 193, 108 S.Ct. 523, 528 (1988) (citations and footnotes omitted).

Vacation of prior judgments, orders and decisions issued in a case that has become moot is therefore mandatory under 28 U.S.C. § 2106 because such judgments should not be accorded *res judicata* or collateral estoppel effect or result in other collateral consequences where the

initial controversy terminates, thereby preventing an action from being litigated to a final resolution:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in Duke Power Co. v. Greenwood County, 299 U.S. 259, 267, 57 S.Ct. 202, 205, 81 L.Ed. 178, to be "the duty of the appellate court". That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.
>
> . . . Denial of a motion to vacate could bring the case here. Our supervisory power over the judgments of the lower federal courts is a broad one. See 28 U.S.C. § 2106, 28 U.S.C.A. § 2106, 62 Stat. 963; [citations omitted]. As already indicated, it is commonly utilized in precisely this situation to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences.

United States v. Munsingwear, Inc., 340 U.S. 36, 39-41 (1950) (footnote omitted).

These well-defined principles are followed by the majority of the courts of appeal. *See e.g., Long Island Lighting Co. v. Cuomo*, 888 F.2d 230, 233 (2d Cir. 1989); *Federal Data Corp. v. SMS Data Products Group*, 819 F.2d 277, 279 (Fed Cir. 1987); *Kennedy v. Block*, 784 F.2d 1220, 1225 (4th Cir. 1986); *Aviation Enterprises, Inc. v. Orr*, 716 F.2d 1403, 1407-1408 (D.C. Cir. 1983); *Delta Airlines v.*

McCoy Restaurants, Inc., 708 F.2d 582, 584 (11th Cir. 1983); *Swingline, Inc. v. I.B. Kleinert Rubber Co.*, 399 F.2d 283, 284-85 (C.C.P.A. 1968). They are not adhered to by the seventh and the ninth circuits. *Iowa County; National Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762 (9th Cir. 1989); *Ringsby Truck Lines, Inc. v. Western Conf. of Teamsters*, 686 F.2d 720 (9th Cir. 1982).

The ninth circuit itself has admitted that its "*Ringsby* decision has been roundly criticized[.]" *Harrison Western Corp. v. U.S.*, 792 F.2d 1391, 1394 n.2 (9th Cir. 1986), *citing* 13A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3533.10 (2d Ed. 1984) at 431-32. And the seventh circuit seemingly acknowledges that its position is at odds with the actions of the Court in *Chicago Bd. Options Exchange, Inc. v. Board of Trade of City of Chicago*, 459 U.S. 1026 (1982) and *Board of Regents of University of Texas System v. New Left Education Project*, 414 U.S. 807 (1973) (per curiam). *See Commodity Futures Trading Com'n v. Board of Trade*, 701 F.2d 653, 657 (7th Cir. 1983). Yet, it reflexively persists in its position because it refuses to "squander[] judicial time that has already been invested." *Iowa County*, 862 F.2d at 1302.

This reasoning is totally at odds with the decisions of this Court. Vacation of any judgment under *Munsingwear* "strips the decision below of its binding effect." *Deakins*, 108 S. Ct. at 528. It also "deprives that court's opinion of precedential effect. . . . " *County of L.A. v. Davis*, 440 U.S. 625, 634 n.6 (1979), *quoting O'Connor v. Donaldson*, 422 U.S. 563, 577-78 n.12 (1975). Thus, application of *Munsingwear* by any court of appeals "of course leave[s] open and unresolved the questions addressed by the district court

in its earlier published opinion." *Kennedy*, 784 F.2d at 1225.

Although judicial resources are gained when they may be devoted to other proceedings because a case has become moot, there is always some "loss" resulting from the prior expenditure of those resources in a mooted case. Since that is always true, the standard established by the seventh circuit undercuts the entire rationale of *Munsingwear*. Yet, the holding in that case inevitably leads to the conclusion that "it is appropriate for a court of appeals to vacate its own judgment if it is made aware of events that moot the case during the time available to seek certiorari." 13A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3533.10 at 435 (footnote omitted).

The subsidiary reasons advanced by the seventh circuit in *Iowa County* for rigidly refusing to vacate prior judgments, orders and decisions also do not withstand scrutiny:

> Support was found in various analogies – if the losing party complies with a judgment rather than appeal, the judgment is not found moot and vacated; if the Solicitor General confesses error in the Supreme Court, the Court retains power to decide the case on the merits or to remand for reconsideration; voluntary discontinuance of offending conduct does not automatically lead to mootness. In the epigrammatic opening paragraph, the court opined that the district court opinion "is a public act of the government, which may not be expunged by private agreement. History cannot be rewritten. There is no common law writ of erasure." In re Memorial Hospital, C.A. 7th, 1988, 862 F.2d 1299. For the reasons suggested in the main

> volume, none of these arguments seems persuasive. It is particularly daunting to contemplate that even after the parties have preferred to surrender the opportunity for appellate review as a matter of right in order to achieve the certainty and economy of settlement, they can do so only if they are willing to submit to nonmutual issue preclusion in litigation with nonarties; the frailties of nonmutual preclusion are ‹plored in vol. 18, §§ 4463-4465.

13A Wright, Miller & Cooper, *Federal Practice & Procedure* § 3533.10 (Supp. at 192).

Alleghany has conceded, and both district courts have found, that this action is moot. Under *Munsingwear,* the seventh circuit therefore had a mandatory duty to grant the states' request to vacate. There is no support for any other standard in any decision of this Court.

II. EVEN IF THE EXERCISE OF DISCRETION IS PERMITTED UNDER 28 U.S.C. § 2106 WHEN DETERMINING WHETHER VACATION IS APPROPRIATE IN CASES THAT HAVE BECOME MOOT, THE COURT OF APPEALS ABUSED ITS DISCRETION IN THIS CASE.

The rule established in the ninth circuit requires "consider[ation of] the equities and hardships in resolving the question" of whether vacation is appropriate. *Seafirst Corp.*, 891 F.2d at 769. Abuse of discretion is the standard it applies in reviewing such decisions. *Id.*

Any discretion that may be invoked under 28 U.S.C. § 2106 was abused by the seventh circuit. Indiana and Wisconsin intended to seek writs of certiorari to review the seventh circuit's decision. They were precluded from

doing so, not by any of their own actions, but by actions of Alleghany and St. Paul that occurred without their knowledge or consent. It is hardly equitable for Alleghany, which pocketed $35 million by virtue of its settlement with St. Paul and then sought stipulations dismissing its challenges to the states' insurance takeover laws as moot, to claim that there are any legitimate grounds for permitting collateral consequences to flow from a decision that significantly erodes the ability of the states to have other kinds of cases or controversies decided in their own courts. *See e.g., Lynn Hinrichs v. Patricia Goodrich*, No. 90-C-0072-C (W.D. Wis., November 30, 1990) (A-145).

By its very nature, the doctrine of abstention is of the utmost importance to the states. Both the facts surrounding the states' conduct and the subject matter of this action dictate that vacation is required even if the exercise of discretion is permissible under 28 U.S.C. § 2106.

III. EVEN IF VACATION IS PROPER ONLY IN CASES IN WHICH CERTIORARI WOULD HAVE BEEN GRANTED, THE ORDERS OF THE COURT OF APPEALS SHOULD BE REVIEWED AND REVERSED.

The United States has at times urged the Court to grant certiorari and vacate decisions of lower courts only "where it would have granted the petition for certiorari had the case not become moot." *Commodity Futures*, 701 F.2d at 657 (citation omitted). Note, *Collateral Estoppel and Supreme Court Disposition of Moot Cases*, 78 Mich. L. Rev. 946, 951 (1980). The suggestion is unsound: "The requirement that the Court undertake a hypothetical disposition

of the petition would impose an unwarranted burden." 13A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3533.10 at 433 (footnote omitted). Even if it were accepted, certiorari would likely have been granted in this case to resolve a conflict in the circuits on a jurisdictional question of importance to all states, since the eighth circuit found that abstention was required in two similar challenges to takeover laws brought by Alleghany. *Alleghany Corp. v. Pomeroy*, 898 F.2d 1314 (8th Cir. 1990); *Alleghany Corp. v. McCartney*, 896 F.2d 1138 (8th Cir. 1990). *See Haase*, 896 F.2d at 1056.

To the extent that any certiorari requirement can be imposed, Indiana and Wisconsin have met it. Review and reversal of the court of appeals' orders is therefore required under any standard that is conceivably applicable to cases that have become moot.

CONCLUSION

Indiana and Wisconsin (as well as Illinois) are laboring under the jurisdictional burden of a decision which, through no fault of their own, they are unable to challenge. That precedent has already been construed broadly by a federal district court in Wisconsin (A-145). Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota are not subject to such an expansive application of federal jurisdiction. *Pomeroy*, 898 F.2d 1314; *McCartney*, 896 F.2d 1138. Vacation of the judgment, orders and decisions in *Haase*, 896 F.2d 1046 and 708 F. Supp. 1507, and in *Eakin*, 712 F. Supp. 716, will restore uniformity to the law of abstention and afford all states an equal opportunity to assert that important interests protected by that doctrine should be litigated in their own courts.

Illinois, Indiana and Wisconsin, as well as all other litigants in the seventh circuit, are also currently being subjected to more onerous collateral consequences from decisions issued in their federal courts than are faced by litigants in any other circuit. Vacation of the underlying decisions in this case and concomitant rejection of the rationale proffered by the seventh circuit in *Iowa County* and reaffirmed below will also assure that all federal litigants face the same legal consequences when an action becomes moot.

Indiana and Wisconsin respectfully request that the July 19 and July 23 orders of the Seventh Circuit Court of Appeals be reversed, that its judgment and memorandum decisions of April 15, 1990 and February 21, 1990 be vacated and that this case be remanded with directions to

vacate the March 7, 1989 judgment, memorandum decision and order of the United States District Court for the Western District of Wisconsin and the January 30, 1989 memorandum decision and order of the United District Court for the Southern District of Indiana. *See Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 94 (1979).

Dated this 17th day of December, 1990.

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Petition For A Writ Of Certiorari
To The United States Court Of Appeals
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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

July 23, 1990

By the Court:

ALLEGHANY CORPORATION, etc., Plaintiff-Appellant	)	Appeal from the United States District Court for the Western District of Wisconsin: No. 88 C 368 Chief Judge Barbara B. Crabb
No. 89-1655 v	)	
ROBERT D. HAASE, etc., Defendant-Appellee	)	
and	)	
ST. PAUL COMPANIES, etc., et al., Intervening Appellees	)	
	)	
ALLEGHANY CORPORATION, etc., Plaintiff-Appellee	)	Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division: No. 88 C 561 Judge William E. Steckler
Nos. 89-2055, 89-2056 v	)	
HARRY E. EAKIN, etc., Defendant-Appellant	)	
and	)	
ST. PAUL COMPANIES, etc., et al., Intervenors-Appellants	)	

This matter comes before the court for its consideration of the "RESPONSE TO MOTION TO VACATE" filed herein on July 20, 1990, by counsel for the defendant-appellee, Robert D. Haase.

In light of this court's order of July 19, 1990,

IT IS ORDERED that said response is DENIED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

July 19, 1990

Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon.

Hon.

ALLEGHANY CORPORATION, a Delaware Corporation, Plaintiff-Appellant Cross-Appellee	Appeals from the United States District Court for the Western District of Wisconsin.
Nos. 89-1655, 89-2055, 89-2056 v.	No. 88 C 368
ROBERT D. HAASE and JOHN J. DILLON, III, Defendants-Appellees Cross-Appellants and ST. PAUL COMPANIES, INC. et al., Intervening Appellees Cross-Appellants	Judge Barbara B. Crabb

This matter comes before the court for its consideration of the "MOTION TO VACATE JUDGMENT AND DECISION OF THIS COURT" filed herein on July 16, 1990, by counsel for John J. Dillon, III. On consideration thereof,

IT IS ORDERED that said motion is DENIED. See *In re: Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299 (7th Cir.1988).

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 89-1655

ALLEGHANY CORPORATION,

Plaintiff-Appellant,

v.

ROBERT D. HAASE, Commissioner of Insurance of the State of Wisconsin,

Defendant-Appellee,

and

ST. PAUL COMPANIES, INC. and ST. PAUL FIRE AND CASUALTY INSURANCE COMPANY,

Intervening Defendants-Appellees.

Nos. 89-2055, 89-2056

ALLEGHANY CORPORATION,

Plaintiff-Appellee,

v.

JOHN J. DILLON, Commissioner of Indiana Department of Insurance,

Defendant-Appellant,

and

ST. PAUL COMPANIES, INC. and ST. PAUL FIRE AND CASUALTY INSURANCE COMPANY,

Intervening Defendants-Appellants.

Appeals from the United States District Courts for the Western District of Wisconsin and for the Southern District of Indiana.
No. 88 C 368 – **Barbara B. Crabb,** *Judge.*
No. 88 C 561 – **William E. Steckler,** *Judge.*

ARGUED DECEMBER 8, 1989 – DECIDED FEBRUARY 21, 1990

Before POSNER and EASTERBROOK, *Circuit Judges,* and DUMBAULD, *Senior District Judge.**

POSNER, *Circuit Judge.* These three appeals arise from two closely related suits brought by Alleghany Corporation to invalidate, on federal constitutional grounds, portions of the insurance holding company statutes of Wisconsin and Indiana. Acting under the authority of Wis. Stat. §§ 600.03(13), 611.72, 617.11(1), and Ind. Code §§ 27-1-23-1 *et seq.*, respectively, the insurance commissioners of these states turned down Alleghany's application for permission to acquire 20 percent of the common stock of The St. Paul Companies, Inc., an insurance holding company. Alleghany could have sought review of the commissioners' decisions in the courts of the respective states, but it did not do so. The appeals present the single question whether, because of this omission, the doctrine of *Younger v. Harris,* 401 U.S. 37 (1971), forbids the federal courts to entertain Alleghany's suits. A district judge in Wisconsin said yes and dismissed Alleghany's suit, 708 F. Supp. 1507 (W.D. Wis. 1989), precipitating Alleghany's

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* Hon. Edward Dumbauld, of the Western District of Pennsylvania, sitting by designation.

appeal (No. 89-1655). A district judge in Indiana said no but certified his ruling for immediate appeal under 28 U.S.C. 1292(b), and we accepted appeals from his ruling by both the Indiana insurance commissioner (No. 89-2055) and St. Paul (No. 89-2056). St. Paul had been permitted to intervene in both suits – on the commissioners' side. Its management does not want to be taken over by Alleghany, and fears that a takeover bid may ensue if Alleghany obtains 20 percent of its stock.

St. Paul owns insurance companies incorporated in ten separate states, each of which is among the 47 states that have nearly identical statutes requiring anyone who wants to acquire more than ten percent of the stock of either an insurance company incorporated in the state, *or the parent of such a company*, to obtain the approval of the state insurance commissioner. The commissioner is to render a written decision after a full hearing, the decision to be based on specified criteria including the applicant's integrity and financial strength and the competitive effects of the proposed acquisition. Alleghany filed applications in all ten states. Four granted the application. Four – including Wisconsin and Indiana – turned it down. It is pending in one (Delaware). And it was withdrawn in another (Illinois) pending the determination, in proceedings already begun to challenge the rulings by the insurance commissioners in the other states, of the constitutionality of the insurance company holding statutes. Proceedings there are – galore. The four approvals gave rise to two appeals to state courts by St. Paul from the commissioners' ruling. In one, a state supreme court reversed the decision of the lower courts not to review the commissioner's approval, and remanded for that

review, *St. Paul Cos. v. Hatch*, 449 N.W.2d 130 (Minn. 1989); the other is pending. The four rejections gave rise to four suits by Alleghany challenging the constitutionality of insurance holding company statutes – the two on appeal to us plus two on appeal to the Eighth Circuit. In one of the Eighth Circuit cases a district court had abstained under *Younger*. In the other the district court had refused to abstain, proceeded to the merits, and held North Dakota's statute unconstitutional as an unreasonable burden on commerce. *Alleghany Corp. v. Pomeroy*, 698 F. Supp. 809, 700 F. Supp. 460 (D.N.D. 1988). Although the McCarran-Ferguson Act provides "that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States," 15 U.S.C. § 1011(a) – thus eliminating, one might suppose, any challenge to the insurance holding company statutes based on congressional silence (the predicate for invoking the "dormant" commerce clause) – the court in *Pomeroy*, citing *SEC v. National Securities, Inc.*, 393 U.S. 453, 459-61 (1969), distinguished between the business of insurance and the ownership of an insurance company, and held that state regulation of the ownership was not insulated by the Act. Whether this interpretation is correct is not an issue on this appeal; the defendants do not contend that it is frivolous.

The controversy between Alleghany and the insurance commissioners is a live one. Even though Alleghany has already been turned down by several of the commissioners, and it needs the permission of all to go ahead with the acquisition, this is only if the statutes are constitutional. If they are not, Alleghany does not require permission under these statutes.

If Alleghany had sought judicial review of the Wisconsin or the Indiana commissioner's ruling in a state court, as it could have done, Wis. Stat. § 227.53(1); Ind. Stat. § 4-21.5-5-3(a), and had lost, it could not have maintained a suit in federal district court to invalidate the ruling, whether on constitutional or any other grounds – provided only that the state courts would have had jurisdiction to consider Alleghany's federal claims, and they would have. Wis. Stat. § 227.57(8); Ind. Code § 4-21.5-5-24(d)(2). The qualification is essential, but if it is satisfied the suit in federal court would be barred by res judicata. *Button v. Harden*, 814 F.2d 382, 384 (7th Cir. 1987). The commissioners and St. Paul argue that Alleghany should not be permitted to obtain access to a federal forum by refusing to exercise its unquestioned right to judicial review of the commissioners' rulings in state court, review that would encompass any federal as well as state grounds for questioning the rulings and that would keep Alleghany in state court.

It will help in analyzing the issue to step back a pace and ask, could these two federal court suits be maintained if Alleghany had not applied to the commissioners for approval? *Ex parte Young*, 209 U.S. 123 (1908), implies an affirmative answer. It holds that federal courts have the power to enjoin threatened state action that, if carried out, would violate the plaintiff's federal rights. True, there is always a potential question of "ripeness" (on which see generally *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 200-01 (1983)) in an attack on merely threatened action. Is the threat sufficiently imminent and probable to create a real controversy between the plaintiff and the

state officials? Only if the plaintiff can show that it is can he maintain a federal suit. *Wooley v. Maynard*, 430 U.S. 705, 710 (1977); *Steffel v. Thompson*, 415 U.S. 452, 458-59 (1974); *National Metalcrafters v. McNeil*, 784 F.2d 817, 821-22 (7th Cir. 1986); *Illinois v. General Electric Co.*, 683 F.2d 206, 209-10 (7th Cir. 1983). The cost of, and delay in, obtaining regulatory approvals from ten states before a hostile tender offer could even be made would have entitled Alleghany to maintain, against objections based on lack of ripeness, federal suits in all ten states to enjoin the enforcement of the state's insurance holding company statute, alleged to be an unreasonable burden on interstate commerce because each state is seeking to regulate a transaction having its major incidence elsewhere. *Browning-Ferris Industries v. Alabama Dept. of Environmental Management*, 799 F.2d 1473, 1478 (11th Cir. 1986); *City of Altus v. Carr*, 255 F. Supp. 828, 836 (W.D. Tex. 1966) (three-judge court), aff'd per curiam, 355 U.S. 35 (1966). Examples of similar suits in this circuit attacking regulatory obstacles to hostile takeovers include *MITE Corp. v. Dixon*, 633 F.2d 486 (7th Cir. 1980), affirmed as *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), and *Dynamics Corp. v. CTS Corp.*, 794 F.2d 250 (7th Cir. 1986), reversed, 481 U.S. 69 (1987).

Our conclusion that Alleghany could have brought its suits challenging the insurance holding company statutes without first applying to the insurance commissioners for permission to acquire the St. Paul Companies would be mistaken if there were a general requirement of exhausting state remedies before bringing federal suits challenging state action. For then Alleghany would have to apply to the commissioner and if turned down would have to appeal to a state court – and by operation of res

judicata would be forever denied a federal forum unless the Supreme Court chose to review the decision of the highest state court to which Alleghany could appeal an adverse decision. *Lynk v. LaPorte Superior Court*, 789 F.2d 554, 564 (7th Cir. 1986); cf. *id.* at 563 (discussing *Rooker-Feldman* doctrine). But there is no general requirement of exhausting state judicial or administrative remedies before bringing a federal suit, although there are important exceptions to this generality, such as the requirement of exhaustion in the habeas corpus statute. 28 U.S.C. § 2254(b). The Supreme Court has held that 42 U.S.C. § 1983, the principal vehicle for challenging state action on federal grounds and the one used by Alleghany in these suits, contains no requirement of exhausting administrative remedies. *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982). Exhaustion of judicial remedies is sometimes required, in effect, by the rule of *Parratt v. Taylor*, 451 U.S. 527 (1981), but any general requirement of exhausting state judicial remedies before bringing a federal civil rights suit would spell the demise of *Ex parte Young*, since the decision in the state suit usually would have preclusive effect on the federal. We are not authorized to issue a death warrant for *Ex parte Young*.

All this is not to say that anyone who brings suit in federal court to enjoin the operation of a state statute, or other state action, is, by virtue of *Ex parte Young*, automatically entitled to an injunction, provided that all jurisdictional requirements such as ripeness are satisfied and the plaintiff can demonstrate that his federal rights have indeed been violated. The right to an injunction depends on more than just presenting a good legal claim to a court having jurisdiction. Part of the more consists of general

equitable considerations and another part, though it is applicable only to a subclass of injunction suits, consists of considerations of comity – the interest in harmonious relations between sovereigns and therefore between the federal government and the states. It is in regard to considerations of equity and comity that the doctrine of *Younger v. Harris* comes into play. Its central meaning is that a federal district court may not, save in exceptional circumstances, enjoin, at the behest of a person who has actually or arguably violated a state statute, a state court proceeding to enforce the statute against that person. *Illinois v. General Electric Co., supra,* 683 F.2d at 213. His remedy is to interpose his federal claims as a defense in that action. The adequacy of alternative remedies is a standard ground for denying an injunction, although today one only sporadically invoked. The unseemliness of a federal court's interrupting a proceeding brought by state officials to enforce state law in state courts provides an additional, and the decisive, ground, based on comity, for denying such an injunction.

These grounds are at their strongest when, as in *Younger* itself, the state is prosecuting a person for a crime. Allowing him to block the prosecution by obtaining an injunction from a federal judge would come close to allowing a state criminal defendant to remove his criminal prosecution into federal court – a course that would wreck the balance between federal and state prerogatives that is struck in the habeas corpus statute. And it would do this gratuitously, since the defendant can interpose his federal defenses in the state action and will even have a later shot at a federal forum – not only the Supreme Court under the certiorari jurisdiction, but also,

and more practically, the district court under the habeas corpus jurisdiction, provided only that he is convicted and imprisoned, and if not his interest in having access to a federal forum will be much reduced.

The grounds for denying a federal-court injunction are only slightly attenuated when instead of a criminal prosecution the state has brought a civil enforcement action, such as the suit to close a pornographic movie theater in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975). And there is only a slight further attenuation when, as in *Hicks v. Miranda*, 422 U.S. 332, 350 (1975), the state proceeding is begun after the defendant in that proceeding has brought his federal injunctive suit. It is not the order of the suits that matters but the fact that the federal plaintiff has violated (or is alleged to have violated) state law. The state normally is entitled to prosecute or otherwise proceed against the violators of its laws in its own courts without interruption by a federal district court. But the principle of *Ex parte Young* stands unimpaired in cases in which the federal plaintiff has not violated state law, has not exposed himself to a state enforcement proceeding, is not a defendant in such a proceeding, but merely seeks to sweep away an illegal obstacle to his activities. *Illinois v. General Electric Co., supra*, 683 F.2d at 213.

This clearly would be such a case if Alleghany had sued the state insurance commissioners before applying for permission to acquire St. Paul. And if this is right, then the argument that by virtue of having applied to the commissioners Alleghany forfeited its right under *Ex parte Young* to bring a suit to enjoin the enforcement of the state insurance holding company statues yields a

paradox. If accepted, the argument would deter firms in Alleghany's position from applying for a state license before challenging the constitutionality of the state's licensing scheme, since the application would channel the firm into the state court system even if it preferred to be in federal court. With firms thus induced to avoid the state regulatory process, the principles of federalism would be affronted rather than protected. Moreover, the argument we are examining implies that instead of Alleghany's filing four suits in order to challenge the regulatory scheme (suits against the four insurance commissioners who turned it down), it would have had to file ten suits – suits against all the insurance commissioners whose permission was required under state law; for only by suing the commissioners in advance of applying for permission could Alleghany maintain these suits in federal courts.

If the state insurance commissioners had the power to decide issues of federal constitutional law, if decisions by the commissioners were given preclusive effect by the courts of the commissioner's state, and if procedures employed by the commissioners were deemed adequately "judicial" in character to compel the federal courts to give the commissioners' findings the same preclusive effect as a matter of federal common law, *University of Tennessee v. Eliott*, 478 U.S. 788 (1986), then the doctrine of res judicata would force Alleghany – once it had filed an application – to seek review of the commissioner's decision in state court. Alleghany could not split its constitutional claim. *Watson Rural Water Co. v. Indiana Cities Water Corp.*, 540 N.E.2d 131 (Ind. App. 1989); *Patzer v. Board of Regents*, 763 F.2d 851, 857 (7th Cir. 1985) (Wisconsin law). There are an

awful lot of if's here. We discuss only one. The defendants concede that the commissioners lack the power to determine the constitutionality of the statutes they enforce, in which event there is no issue of splitting. The concession may be premature. It is true that this limitation on the power of administrative agencies, state and federal, is extraordinarily common; the California Constitution, for example, declares that "an administrative agency . . . has no power to declare a statute unenforceable," Art. III, § 3.5(b); *Beltran v. California*, 871 F.2d 777, 783 (9th Cir. 1988); *Fresh Int'l Corp. v. Agricultural Labor Relations Bd.*, 1353, 1362 n. 14 (9th Cir. 1986). And it is true that the limitation is assumed in a large number of cases, of which the following are merely illustrative: *Public Utilities Comm'n v. United States*, 355 U.S. 534, 539 (1958); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); *Mathews v. Diaz*, 426 U.S. 67, 76 (1976); *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 629 (1986); *Continental Air Lines, Inc. v. Department of Transportation*, 843 F.2d 1444, 1456 (D.C. Cir. 1988); *Denberg v. Railroad Retirement Bd.*, 696 F.2d 1193, 1196 (7th Cir. 1983). But we know of no case where the limitation had actually been challenged, for example as violating the supremacy clause. In defense of the limitation it could be argued that while every public official has a paramount duty to obey the Constitution, not every such official is competent to interpret the Constitution, and it is therefore a sensible division of labor to confine interpretive questions to judicial officers. We need not resolve the issue here. The defendants have conceded that the state commissioners cannot determine the constitutionality of the insurance

holding company statutes, and their concession binds them.

So res judicata is not a bar to these suits. Nor, to get back on the main track, is *Younger*. Alleghany has not violated state law, because it has not attempted to consummate its attempted takeover of St. Paul without obtaining the required permissions from the insurance commissioners. It is not the target of a state enforcement proceeding. The plaintiff in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) – a case of which the present defendants make much – had brought a federal suit to prevent a state court from requiring the posting of an appeal bond in an ongoing state litigation; there is no state litigation here. Texaco had been sued for violating state law (tortious interference with contract rights), had lost in the trial court, and was suing in federal court to protect its right of appeal in the state court system. The suit was held barred by *Younger*. Texaco arguably had violated state law; Alleghany has not. The state courts are of course *open* to Alleghany – even more clearly, indeed, than they were open to Texaco – but they are open to anyone who complains that state officials are violating his federal rights; if that were a ground for abstention, federal courts would not have to decide the 23,558 civil rights suits filed by state prisoners in federal district courts last year.

The principle on which we are proceeding is dramatically illustrated by *Wooley v. Maynard, supra*. The plaintiff was seeking to enjoin a state statute that required the slogan "Live Free or Die" to be embossed on license plates. He had already been convicted three times of violating the statute. He had not appealed any of these convictions. Yet *Younger* was held not to bar his suit; since

he was seeking only prospective relief he was free to invoke the aid of a federal court, even though he could easily have raised his federal claims as a defense in the state criminal cases. 430 U.S. at 710-11. The *Younger* doctrine is designed for the case where an injunction would interfere with a state court's efforts to enforce state law. Alleghany seeks neither to abort a state proceeding nor to obtain a resolution of state law questions in federal court. It asks a federal court to enjoin on federal grounds a state law whose meaning has been settled by state officials.

Any intimations of a broader scope for *Younger* arising from the fact that the plaintiff in *Pennzoil* was not a public agency were promptly scotched by *New Orleans Public Service, Inc., (NOPSI) v. Council of City of New Orleans*, 109 S. Ct. 2506, 2518-20 (1989). The essential thing in *Pennzoil*, it is now clear, is that once the state trial court rendered a judgment against Texaco, the state had a substantial interest in enforcing the procedures that it had established to regulate appeals. For Texaco to sue in federal court to enjoin collection was like a convicted state criminal defendant's suing in federal court to enjoin the state from requiring him to appeal within a fixed period of time.

NOPSI not only clarifies the scope of *Pennzoil*, but is a case much like the present one. A local ratemaking body had refused to grant the request of a power company to be permitted to raise its rates. The company could have challenged the refusal in state court, but instead brought a federal suit to enjoin the refusal on federal grounds. The Supreme Court held *Younger* inapplicable.

The precise holding of *NOPSI* is that since ratemaking is a legislative rather than judicial function, an injunction would not interrupt a state judicial proceeding. The defendants in our case therefore ask us to characterize the denial of the permissions sought by Alleghany as judicial in character, and the administrative proceeding plus state judicial review as a unitary judicial proceeding, since "for *Younger* purposes, the State's trial-and-appeals process is treated as a unitary system, and for a federal court to disrupt its integrity by intervening in mid-process would demonstrate a lack of respect for the State as sovereign." *Id.* at 2518. See also *Huffman v. Pursue, Ltd., supra,* 420 U.S. at 608-09. The defendants are correct that for these purposes an administrative proceeding can be " 'judicial in nature' "; the Supreme Court so held with reference to attorney disciplinary proceedings in *Middlesex Ethics Committee v. Garden State Bar Ass'n,* 457 U.S. 423, 433-34 (1982). See also *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., supra,* 477 U.S. at 627. That was just a conclusion, but a conclusion justified by the fact that to remove such proceedings into federal district court would be precisely the sort of federal judicial interference with a state's effort to bring the violators of its laws to book that *Younger* interdicts. Whether the state proceeds against malefactors administratively or judicially is a distinction irrelevant to the policy behind *Younger (Bethune Plaza, Inc. v. Lumpkin,* 863 F.2d 525, 528 (7th Cir. 1988)), especially since the federal Constitution does not prescribe the allocation of powers between branches of state government – it does not require the states to *have* separate branches. *United Beverage Co. v. Indiana Alcoholic Beverage Comm'n,* 760 F.2d 155 (7th Cir. 1985). But there has

been as yet no malefaction here, and we cannot see any difference between the refusal by a state agency to allow a power company to raise its rates and the refusal by a state agency to allow one company to buy another. Cf. *St. Paul Cos. v. Hatch, supra,* 449 N.W.2d at 134-37. If federal judicial intervention does not demonstrate disrespect for state sovereignty in the first case, neither does it in the second.

This case is actually a weaker case for *Younger* abstention than was *NOPSI*. The regulatory order in *NOPSI* was in response to alleged negligence by the power company in failing to minimize its costs by diversifying its sources of power. Functionally, it was a remedial order. Indeed, in effect though not in legal form it was "punishment" for past misconduct by the firm. A state has, as we have been at pains to stress, a strong interest in punishing its malefactors, and this whether the punishment takes the form of a rate order or of a seizure of contraband or of a criminal sanction. The ratemaking order in *NOPSI* might therefore have been analogized to the disciplinary proceeding in *Middlesex*. No such analogizing to *Middlesex* (or to *Dayton Christian Schools)* is possible here. The critical element of misconduct – emphasized ad nauseam not only in this opinion but in our earlier opinion in *Illinois v. General Electric Co., supra,* 683 F.2d at 213 – is missing. We repeat the holding of that decision: *Younger* is confined to cases in which the federal plaintiff had engaged in conduct actually or arguably in violation of state law, thereby exposing himself to an enforcement proceeding in state court which, once commenced, must be allowed to continue uninterrupted to conclusion (if no state proceeding is ever commenced,

there is of course no *Younger* bar). This is not such a case. Within the potential domain of *Younger* marked out by this distinction, there are additional limits illustrated by *NOPSI*, but we need not consider their bearing.

We note, finally, that decision from other circuits support our result. *Ford Motor Co. v. Insurance Commissioner*, 874 F.2d 926, 933-35 (3d Cir. 1989); *Kerkado-Melendez v. Aponte-Roque*, 829 F.2d 255, 258-62 (1st Cir. 1987).

The decision of the district court in Indiana, refusing to abstain, is affirmed (Nos. 89-2055, 89-2056); the decision of the district court in Wisconsin, abstaining, is reversed (No. 89-1655).

EASTERBROOK, *Circuit Judge*, concurring. I join the court's opinion but add a few words about the commissioners' "concession" that they cannot evaluate the constitutionality of the laws they administer. How can a state "concede" that the Constitution is not supreme for its executive branch? The Supremacy Clause, Art. VI cl.2, provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ". The Constitution is supreme for commissioners of insurance no less than for legislators and judges. Concessions surrender valuable entitlements; here the concession asserts an immunity from federal rules, an act of aggrandizement rather than abasement. As the court observes, slip op. 9, the concession is common, but no case I could find holds that state agencies have the immunity from federal law they say they possess.

State agencies could disregard federal rules only if the second portion of the Supremacy Clause – "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." - meant that the Constitution is supreme *only* for judges. Yet the nullification debates are behind us. No one believes these days that legislative and executive branches of state governments may ignore the Constitution and federal law until slapped with an injunction. The Supremacy Clause establishes a hierarchy of rules, binding on all governmental actors. The Illinois Commerce Commission may not, for example, yank the certificates of two interstate carriers whose merger was approved by the Interstate Commerce Commission and issue an opinion saying something like: "We ignore the Interstate Commerce Act when making our decisions, and if you don't like that go sue us." Federal law is supreme for all state actors, at all times, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Federal courts proclaim, when requiring state officials to pay damages for disobedience to federal law (including constitutional doctrine), that state actors must follow the federal rules without waiting for litigation. National rules govern even though no case on all fours has been rendered. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir. 1988). Local governments acting on the basis of local rules that have been preempted by federal ones must pay damages. E.g., *Golden State Transit Corp. v. Los Angeles*, 110 S. Ct. 444 (1989); *Community Communications Co. v. Boulder*, 455 U.S. 40 (1982). Governmental bodies do not even

get the benefit of the qualified immunity available to their minions. *Owen v. City of Independence*, 445 U.S. 622 (1980). Governments are liable only for their laws and other policies, so the universe of damages actions against governmental bodies is precisely the one in which, according to the "concession" in this case, agencies are free to disregard federal law.

Officials may not act as if state law is the only law. After *Brown v. Board of Education*, 347 U.S. 483 (1954), made it pellucid that the Constitution forbids discrimination in the operation of public schools, a school board could not say that it was required by state law to segregate its students and had to keep doing this until some judge told it to stop. See *Green v. County School Board*, 391 U.S. 430 (1968). So too with state laws discriminating on account of sex. Once *Duren v. Missouri*, 439 U.S. 357 (1979), held that states may not exclude women from jury venires, it was unnecessary to bring 49 more suits, or perhaps 3,041 more (one per county), to achieve compliance throughout the nation. There were 83,166 local governments in the United States in 1987 and oodles of state agencies, 1988 *Statistical Abstract of the United States* Table 452; I shudder to think that none of them need comply with the Constitution until told to by a judge, one clause at a time. Under the Supremacy Clause, state administrative agencies may – *must* – conform their conduct to constitutional norms without waiting to be hit by a judicial order. Even the concept of a "judicial" order supposes a separation of powers that states are not required to observe. *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 528 (7th Cir. 1988). States may merge the powers of administration and adjudication, as in *Middlesex Ethics Committee*

v. Garden State Bar Ass'n, 457 U.S. 423 (1982), or may abolish judicial review. Reallocations of this kind could not abrogate the Supremacy Clause.

The most sonorous justification for the commissioners' position is that they are *following* the law and leaving to orderly adjudication claims that their law is defective. Such an approach supposes that state rules are the whole law of the commissioners' jurisdictions, that national rules are a form of foreign law. Yet the Supremacy Clause integrates the legal systems. We have one body of law, with a hierarchy among rules.

> The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State, – concurrent as to place and persons, though distinct as to subject matter. . . . The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the State and Federal governments. It is often the cause or the consequence of an unjustifiable jealousy of the United States government, which has been the occasion of disastrous evils to the country.

Claflin v. Houseman, 93 U.S. 130, 136-37 (1876). If state laws conflict, the commissioners will attempt to reconcile these laws as best they can and may enforce one at the expense of another. When the conflicting pair is one state and one federal, the duty to resolve the conflict is no less, and the Supremacy Clause names the winner. To say

otherwise is to misunderstand the structure of our federal system. And it is an offense against that structure to force persons holding federal rights to wait for vindication, and pay lawyers to secure it, when persons holding identical entitlements under state law face no such obstacles.

This does not mean that constitutional questions are the first order of business for an administrator any more than for a court. Judges regularly deal with statutory questions before they take up constitutional ones. Even though deferral increases slightly the expense of obtaining a favorable decision, it is justified to ensure appropriate respect for rules established by the political branches. States might separate their decision-making not only temporally but also among officials, some specializing in statutory interpretation and others in constitutional law. Here the parallel to judicial practice breaks down. An insurance commissioner does not resolve questions of state law and then turn to the state's Attorney General (or even to a court) for authoritative guidance on federal law; the commissioner resolves questions of state law and then issues a binding order. The person claiming a federal right is directed to comply. A judge does not resolve the statutory point, issue an injuction, and *then* turn to the constitution. A judge resolves the questions of federal law before issuing a binding decision; agencies must do this too.

Abjuring administrative "authority" to act on the basis of federal law creates problems under 42 U.S.C. §1983 as well as the Supremacy Clause, for it amounts to a demand that people abandon their federal remedies. Indiana and Wisconsin insist that the state as an entity will listen to constitutional (and other federal) claims

only in state court. Yet §1983 creates an entitlement to litigate in federal court, free of any efforts by the state to limit access. *Felder v. Casey*, 108 S. Ct. 2302 (1988). Given the doctrine of claim preclusion, which 28 U.S.C. §1738 enforces, *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), a state rule allocating to state courts all resolution of claims under federal law amounts to: "This state will ignore your entitlements under federal substantive law unless you give up your right to litigate in federal court." *Felder* and, e.g., *Patsy v. Board of Regents*, 457 U.S. 486 (1982), show that no such demand may be made or honored.

Often we are told that chaos would break out if everyone made his own decision about which legal rules are enforceable. Let us leave difficult questions to the courts, the refrain goes, so that we may have order. Although the division of labor is beneficial in the main – no one who has watched tax protesters find fantastic propositions in the Constitution, see *Coleman v. CIR*, 791 F.2d 68 (7th Cir. 1986), could tolerate the thought of revenue clerks making up and enforcing private versions of constitutional tax law – the proposition that there must be a chain of command takes us only so far. Public officials owe their allegiance to the Constitution first, federal laws second, and state laws third. Even a command from the President of the United States does not relieve public employees of their duty to follow the Constitution. *United States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976). See also *United States v. Konovsky*, 202 F.2d 721, 730-31 (7th Cir. 1953) (reliance on a superior's order does not negate specific intent in a prosecution under 18 U.S.C. §241 for violating the Constitution. Cops on the beat must

follow *Tennessee v. Garner*, 471 U.S. 1 (1985), rather than state laws that may permit or even direct them to use deadly force in apprehending felons. Police who prefer state to federal law will find themselves in the dock.

Perhaps functionaries are entitled to follow the orders of their superiors, unless clearly unlawful, so that there may be efficient and consistent administration. A commissioner of insurance is no functionary; he commands a cadre of lawyers. Any legal staff good enough to interpret the arcane insurance laws these officials must apply can look up constitutional doctrine as well. State agencies, in conjunction with state attorneys general, possess ample legal skill – and more experience, I wager, than a randomly selected judge of a court of general jurisdiction who may not see a claim under the dormant Commerce Clause during his career. We should require no less of a commissioner of insurance than of a police official or a prison warden.

At all events, the "constitutional" question here turns out to be a dispute about the meaning of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15. If that statute authorizes states to regulate insurance holding companies, then there is no remaining issue, see *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 652-55 (1981). If the McCarran-Ferguson Act does not apply, then the jig is up under the dormant Commerce Clause, see *Edgar v. MITE Corp.*, 457 U.S. 624, 643-46 (1982). No insurance commissioner could say with a straight face that he and his staff lack expertise needed to interpret the McCarran-Ferguson Act. They do it all the time.

The role of the Constitution in administrative decison-making turns out to be irrelevant to this litigation. Under 28 U.S.C. §1738, the decision of a state official – be he called "judge" or "commissioner" – has the same preclusive effect in federal litigation as in state litigation. *Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373 (1985). All agree that the decisions of these commissioners of insurance are reviewable in *some* court. Suits filed in state courts could not have been met with claims of preclusion.The preclusive effect would be the same – none – if the commissioners had considered and rejected the Commerce Clause arguments on the merits. Indiana and Wisconsin do not view administrative decisions as preclusive in their own courts, so they are not preclusive in federal court.

A true copy.

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 15, 1989

By the Court:

ALLEGHANY CORPORATION, a Delaware Corporation, Plaintiff-Appellant,	) Appeal from) the United) States District
No. 89-1655	) Court for) the Western
v.	) District of
ROBERT D. HAASE, Commissioner of Insurance of the State of Wisconsin, Defendant-Appellee,	) Wisconsin.)) No. 88-C-368,) Hon. Barbara B.
and	) Crabb,) *Judge.*
ST. PAUL COMPANIES, INCORPORATED and ST. PAUL FIRE AND CASUALTY INSURANCE COMPANY, Intervening Appellees.	)))))

ALLEGHANY CORPORATION, a Delaware Corporation, Plaintiff-Appellee,	) Appeals from) the United) States District) Court for) the Southern) District of) Indiana,) Indianapolis) Division.
No. 89-2055 and 89-2056	)
v.	)
HARRY E. EAKIN, Commissioner of Indiana Department of Insurance) Defendant-Appellee,	)
and	) No. 88-C-561) Hon. William E. Steckler, *Judge.*
ST. PAUL COMPANIES, INCORPORATED and ST. PAUL INDEMNITY INSURANCE COMPANY, Intervenors-Appellants.	)))))

ORDER

The court, on its own motion, orders that these appeals are CONSOLIDATED for purposes of briefing and disposition.

The briefing schedule is as follows:

1. Alleghany Corporation shall file its opening brief and required short appendix in the appeal docketed in 89-1655 on or before July 3, 1989.

2. The St. Paul Companies shall file their combined responsive brief in the appeal docketed in 89-1655 and opening brief and required short appendix in the appeal docketed in 89-2055 on or before August 2, 1989.

3. Robert Haase shall file his responsive brief in the appeal docketed in 89-1655 on or before August 2, 1989.

4. Harry Eakin shall file his opening brief and required short appendix in the appeal docketed in 89-2056 on or before August 2, 1989.

5. Alleghany Corporation shall file its combined reply brief, if any, in the appeal docketed in 89-1655 and responsive brief in the appeals docketed in 89-2055 and 89-2056 on or before September 1, 1989.

6. The St. Paul companies and Harry Eakin shall file their respective reply briefs, if any, in the appeals docketed in 89-2055 and 89-2056 on or before September 15, 1989.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ALLEGHANY CORPORATION,

Plaintiff,

vs.

ROBERT D. HAASE, Commissioner of Insurance of the State of Wisconsin,

Defendant, and

THE ST. PAUL COMPANIES, INC. and ST. PAUL FIRE AND CASUALTY INSURANCE COMPANY,

Proposed Intervening Defendants.

Case No. 88-C-368-C

ORDER FOR DISMISSAL
WITHOUT PREJUDICE

Upon review of plaintiff Alleghany Corporation's Motion for dismissal Without Prejudice and the file and records in this action,

IT IS HEREBY ORDERED that this action, and all claims asserted therein, be, and hereby is, dismissed as

moot without prejudice and without costs or disbursements to any party or proposed intervening party.

Dated: July 19, 1990.

/s/ Barbara B. Crabb
Barbara B. Crabb, Chief Judge
United States District Court

JUDGMENT IN A CIVIL CASE

United States District Court	)	DISTRICT WESTERN DISTRICT OF WISCONSIN
CASE TITLE ALLEGHANY CORPORATION, Plaintiff, v. ROBERT D. HAASE, Defendant.	)	DOCKET NUMBER 88-C-0368-C (Filed MAR 7 1989) NAME OF JUDGE OR MAGISTRATE JUDGE BARBARA B. CRABB

[ ] **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action has come on for consideration by the Court with the judge named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That defendant's motion to dismiss this case is GRANTED.

CLERK

/s/ Joseph W. Skupniewitz
JOSEPH W. SKUPNIEWITZ

DATE

MAR 7 1989

ALLEGHANY CORPORATION, Plaintiff,

v.

Robert D. HAASE, Commissioner of Insurance of the State of Wisconsin, Defendant.

No. 88-C-368-C.

United States District Court,
W.D. Wisconsin.

March 7, 1989.

Jeffrey B. Bartell, Donald K. Schott, William J. Toman, Erica M. Eisinger, Quarles & Brady, Madison, Wis., Thomas W. Tinkham, Richard L. Bond, David R. Abrams, Dorsey & Whitney, Minneapolis, Minn., for plaintiff.

Peter L. Gardon, Whyte & Hirschboeck, Madison, Wis., for intervenor St. Paul Fire & Cas. Ins. Co. and St. Paul Companies, Inc.

Daniel D. Stier, Asst. Atty. Gen., Madison, Wis., for defendant.

James A. Strain, Peter J. Rusthoven, Barnes & Thornburg, Indianapolis, Ind., for American Council of Life Ins. American Ins. Ass'n, amici curiae.

ORDER AND OPINION

CRABB, Chief Judge.

Plaintiff brings this action for declaratory judgment seeking a determination that Wis.Stat. §§ 611.72 and 617.12 violate the Commerce Clause, the Supremacy Clause, and the Fifth and Fourteenth Amendments of the United States Constitution, and Title 42, Section 1983 of

the United States Code, and for injunctive relief to prohibit defendant from enforcing those sections of the Wisconsin statutes. Those sections prohibit the execution of any plan for the acquisition of control (as defined in Wis.Stat. § 600.03(13)) of any domestic stock insurance company, or its parent holding company wherever organized, without the approval of defendant.

Plaintiff, a Delaware corporation with its principal executive office in New York, owns approximately 9.2 percent of the outstanding common stock of the St. Paul Companies, Inc., a publicly-traded insurance holding company domiciled in Minnesota. Plaintiff seeks to acquire presumptive control (in excess of ten percent of the common stock, Wis.Stat. § 600.03(13))) of the St. Paul Companies, Inc., through purchases on the open market. St. Paul Companies' principal and wholly-owned subsidiary is St. Paul Fire & Marine Insurance Company, a Minnesota corporation. St. Paul Fire & Marine has a wholly-owned subsidiary incorporated in Wisconsin, St. Paul Fire and Casualty Insurance Company. St. Paul Fire and Casualty accounts for one-tenth of one percent of the statutory admitted assets and three percent of the premium income of the St. Paul holding company system.

St. Paul Companies has insurance company subsidiaries incorporated in eight states other than Wisconsin. In four of those states, and in Minnesota, approval of plaintiff's proposed acquisition has been either granted or recommended, and in three of those states plaintiff's proposal has been denied (the outcome in the eighth state is not stated in the record).

On November 24, 1987, plaintiff filed with defendant an Insurance Holding Company Registration Statement, seeking approval to acquire in excess of ten percent of the common stock of St. Paul Companies. Defendant held a hearing on plaintiff's proposed acquisition in February 1988, and denied plaintiff's application for approval of the proposed acquisition on April 7, 1988.

Plaintiff had a right to judicial review of defendant's decision under Wis.Stat. ch. 227, and was advised in writing of that right by defendant. Plaintiff did not seek state court review, and the time to seek review expired on May 9, 1988. On April 28, 1988, plaintiff filed this action which is now before the court on defendant's motion to dismiss the complaint under the abstention doctrines of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) and *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

The magistrate filed a report recommending that the motion be granted on the ground that the elements requisite to *Younger* abstention are present: (1) there is a pending state proceeding, (2) that implicates important state interests, (3) and provides an adequate opportunity for plaintiff to raise its constitutional claims. Like the magistrate, I find that the state proceeding set in motion by plaintiff's application and the hearing called by defendant involve important state interests in the regulation of the domestic insurance industry, and that these proceedings provide plaintiff with an adequate opportunity to pursue the federal claims raised in this action.

I find it a very close question whether there is a "pending" state proceeding where, as here, the proceeding being challenged is an administrative hearing that has ended and resulted in a final order. I conclude, however, that recent rulings of the United States Supreme Court direct a finding that a state proceeding is pending if an administrative proceeding has been initiated before a federal action is filed whether or not the proceeding itself is ongoing at the time the federal action is filed, and thus, I am constrained to find that state proceedings were pending when plaintiff filed this suit.

This result follows from the Supreme Court's steady expansion of the *Younger* doctrine, as discussed below in this order. This result also makes manifest the far-reaching implications of such expansion, namely that however important a plaintiff's interest in having a federal forum to hear important issues of federal constitutional law, the federal courts are closed to plaintiffs in any case in which a state administrative or judicial proceeding has been held, even if the plaintiff did not initiate the state proceeding or if the case would not be ripe until the state had acted to give the plaintiff a federal claim.

Nevertheless, I conclude that *Younger* abstention, as extended by the United States Supreme Court, is appropriate in this case, and I will adopt the magistrate's findings of fact and conclusions of law pertaining to *Younger* abstention, supplemented by the findings of fact and conclusions of law set forth in this order.[1]

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[1] Because I will grant defendant's motion to dismiss on *Younger* abstention grounds, I do not consider defendant's

(Continued on following page)

Supplementary Findings of Fact

Of the eight states other than Wisconsin that have asserted a statutory right to approve plaintiff's proposed purchase of over ten percent of St. Paul Companies' shares, California, Minnesota and New York have approved the proposal; in Texas approval has been recommended; Indiana, Nebraska and North Dakota have denied the proposal; and the record does not disclose the outcome in Delaware.

In response to the federal court challenges to the state statutes' constitutionality that plaintiff filed in Indiana, Nebraska and North Dakota, motions to dismiss on *Younger* and *Burford* abstention grounds were denied in Indiana and North Dakota, and granted in Nebraska. *See Alleghany Corporation v. Eakin*, No. I.P. 88-561-C (S.D.Ind. Jan. 30, 1989); *Alleghany Corporation v. Pomeroy*, 698 F.Supp. 809 (D.N.D.1988); *Alleghany Corporation v. McCartney*, No. CV99-L-235 (D.Neb. Oct. 18, 1988).

Opinion

The doctrine of abstention was established in *Younger* and expanded in subsequent cases to protect state

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(Continued from previous page)

argument that *Burford* abstention is also proper in this case. As the magistrate notes in his report and recommendation, the disposition of defendant's motion to dismiss also renders unnecessary consideration of the motion to intervene of St. Paul Fire & Casualty Insurance Company and St. Paul Companies, Inc., and of the motion of these intervenors and plaintiff for summary judgment.

processes from premature federal interference.[2] *Younger*, 401 U.S. at 44, 91 S.Ct. at 750 (principle of federalism requires that federal court "not unduly interfere with the legitimate activities of the states"); *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 528 (7th Cir.1988). In *Younger*, the United States Supreme Court held that under principles of comity, equity, and federalism, the federal courts should refrain from enjoining state criminal prosecutions. *Jacobson v. Village of Northbrook Municipal Corporation*, 824 F.2d 567, 569 (7th Cir.1987). In *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971), the Court extended the holding in *Younger* to prevent federal courts from issuing declaratory judgments regarding state statutes that are subject to ongoing state criminal prosecutions. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 431 n. 10, 102 S.Ct. 2515, 2521 n. 10, 73 L.Ed.2d 116 (1982). The contours of the *Younger* doctrine have since been steadily expanded to encompass pending quasi-criminal and civil judicial and administrative proceedings that implicate important state interests and provide a forum competent to vindicate constitutional challenges to those proceedings. *See, e.g., Pennzoil*

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[2] "The *Younger* doctrine is based on, and its contours established by, two principles of equity jurisprudence. The first is that an injunction is an extraordinary remedy, . . . never more extraordinary than when, if granted it would prevent government officials from proceeding under a statute founded on important state interests against a violator of the statute. . . . The second principle is that an injunction will not be issued when the plaintiff has an adequate remedy at law, which he does if he can assert the ground on which he seeks an injunction as a defense to the very proceeding that the injunction would put a stop to." *W.C.M. Window Company v. Bernardi*, 730 F.2d 486 (7th Cir. 1984).

Company v. Texaco, Inc., 481 U.S. 1, 10-11, 107 S.Ct. 1519, 1525-26, 95 L.Ed.2d 1 (1987).

In *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) (civil nuisance proceeding), the Supreme Court extended *Younger* abstention principles to include state-initiated civil proceedings in aid of and closely related to state criminal statutes. In *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977) (civil contempt order), the Court applied the *Younger* abstention doctrine to important state civil actions that may be analogous to criminal proceedings but that are not intricately bound up with the state's criminal statutes, and in *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977) (civil attachment proceeding), the Court confirmed that *Younger* is not confined to the criminal context but applies also to civil actions brought by the state to vindicate important state policies. In *Middlesex*, 457 U.S. at 423, 102 S.Ct. at 2515, the Court held definitively that *Younger* policies are fully applicable to state civil judicial proceedings when important state interests are involved, and in *Pennzoil*, 481 U.S. at 1, 107 S.Ct. at 1519, the Court held the implication of important court interests factor to be controlling for *Younger* abstention purposes where the state was not even a party to the state proceeding (but where the state plaintiff was a private party acting as a state actor). *Lemon v. Tucker*, 664 F.Supp. 1143, 1146 (N.D.Ill.1987).

In *Middlesex*, 457 U.S. at 432-33, 102 S.Ct. at 2521-22, the Court also ruled that administrative proceedings that are "judicial in nature" are within the category of civil judicial proceedings to which *Younger* applies when important state interests are involved and when there is

an adequate opportunity in those proceedings to raise constitutional challenges. In *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627, 106 S.Ct. 2718, 2723, 91 L.Ed.2d 512 (1986), the Court broadly applied the *Middlesex* articulation of the *Younger* doctrine to ongoing state administrative proceedings, judicial or otherwise, in which important state interests are vindicated and in which the federal plaintiff would have a full and fair opportunity to litigate constitutional claims.

This dual focus on the importance of the state's interests and on the availability of a meaningful opportunity to raise constitutional objections before a competent state tribunal, has been codified in the form of a three-part test that the Supreme Court established in *Middlesex* and applied in subsequent cases to determine whether *Younger* abstention is appropriate in either the criminal or civil context: (1) the existence of a pending state judicial or administrative proceeding, (2) that implicates important state interests, (3) and provides an adequate opportunity for constitutional challenges to be raised. *Pennzoil*, 481 U.S. at 10-11, 107 S.Ct. at 1525-26; *Dayton*, 477 U.S. at 627, 106 S.Ct. at 2723; *Middlesex*, 457 U.S. at 432, 102 S.Ct. at 2521.

Plaintiff expands this test to include as additional determinative factors the existence of a state-initiated enforcement proceeding and the violation of state law. These may be common characteristics of many *Younger* and related cases. However, plaintiff does not cite to, and I am not aware of, any Supreme Court case that explicitly elevates these characteristics to be *Younger* requirements. Moreover, neither of these characteristics was present

when the Court held *Younger* abstention appropriate in *Pennzoil*, 481 U.S. 1, 107 S.Ct. 1519.

In *Pennzoil*, Texaco (the federal plaintiff and state defendant) filed a federal action under 42 U.S.C. § 1983 against Pennzoil (the state plaintiff), seeking to enjoin Pennzoil from taking any action to enforce a multibillion dollar judgment that a Texas court had rendered against Texaco and in favor of Pennzoil. When Texaco filed its federal action, there had not yet been any enforcement proceeding, state-initiated or otherwise, and there had not yet been any violation of state law. Just as in the instant case in which the state would have to act to enforce its decision rendered against plaintiff at the concluded hearing should plaintiff refuse to abide by that decision, so in *Pennzoil* Pennzoil would have had to act, in conjunction with the state, to enforce the state trial court's judgment rendered against Texaco should Texaco have resisted the execution of that judgment. *See Lemon v. Tucker*, 664 F.Supp. at 1146. In both the instant case and in *Pennzoil*, state-initiated enforcement proceedings and violations of state law may follow from the federal plaintiff's taking action contrary to a state tribunal's decision, but such occurrences are not necessary for *Younger* abstention to be applicable before those occurrences take place.

Plaintiff also adds to the *Middlesex* test the absence of any preemption claims, arguing that abstention should not be invoked in preemption cases. "The federal courts of appeal are in disagreement on the question of whether the assertion of a preemption claim renders abstention by the federal district court inappropriate." *Fore Way Express, Inc. v. State of Wisconsin Department of Industry, Labor and Human Relations*, 660 F.Supp. 310, 312 (E.D.Wis. 1987)

(citing *Kentucky West Virginia Gas Company v. Pennsylvania Public Utility Commission*, 791 F.2d 1111, 1115-16 (3rd Cir.1986), *Middle South Energy v. Arkansas Public Service Commission*, 772 F.2d 404, 417 (8th Cir. 1985), *cert. denied*, 474 U.S. 1102, 106 S.Ct. 884, 88 L.Ed.2d 919 (1986), *Champion International Corp. v. Brown*, 731 F.2d 1406, 1408-09 (9th Cir. 1984), and *Baggett v. Department of Professional Regulation, Board of Pilot Commissioners*, 717 F.2d 521, 524 (11th Cir. 1983), holding that the district court should not abstain; *New Orleans Public Service v. City of New Orleans*, 782 F.2d 1236, *vacated in part*, 798 F.2d 858, 860-864 (5th Cir.1986), and *Aluminum Co. v. Utilities Commission of State of North Carolina*, 713 F.2d 1024, 1028-30 (4th Cir.1983), *cert. denied*, 465 U.S. 1052, 104 S.Ct. 1326, 79 L.Ed.2d 722 (1984), affirming decision to abstain in the fact of federal preemption claims). In *Fore Way* the court followed the latter authorities and ruled that a preemption claim does not render *Younger* abstention inappropriate where there exists a complex state regulatory scheme that might be disrupted by federal court review and a state court system that is capable of addressing the federal plaintiff's constitutional challenges. 660 F.Supp. at 313. In the instant case, the challenged state statutes are also part of a complex state regulatory scheme that might be disrupted by federal court intervention, and the state courts are also capable of hearing and deciding plaintiff's federal claims.

In *Fore Way* the court based its ruling primarily on the analysis in *New Orleans Public Service*, 798 F.2d at 858, 863-64. In that case, as in the instant case, the claims

before the court involved the intersection of state interests (in setting retail electricity rates) with federal interests (in wholesale rate making). *Id.* at 860. The court held *Younger* abstention to be proper based on the important state interests in setting retail rates, jurisdiction over which was explicitly reserved to the states by the Federal Power Act. *Id.* at 861. Similarly, in the instant case, where the state's interest in regulating insurance is derived from equally explicit language in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, 1012(a), plaintiff's preemption claim does not suffice to defeat the applicability of *Younger* abstention.

Finally, plaintiff makes the argument, addressed in the magistrate's report at 1535-36, that the *Middlesex* test is not applicable because plaintiff seeks prospective relief only. The Supreme Court has held that *Younger* does not bar resort to a federal forum where the federal plaintiff seeks to preclude future prosecution and not to change his or her record or to annul the results of prior state prosecutions. *Wooley v. Maynard*, 430 U.S. 705, 710-711, 97 S.Ct. 1428, 1432-33, 51 L.Ed.2d 752 (1977). In the instant case, plaintiff seeks "prospective relief" against the enforcement of a decision made at the conclusion of an administrative hearing. Such relief, if granted, would annul the results of that hearing and is no different in effect from the enjoining of pending proceedings in order to prevent both the reaching and enforcement of a result, usually sought by federal plaintiffs in *Younger* cases. What may render *Younger* abstention inappropriate in this plaintiff's case is not that plaintiff seeks prospective relief, for the effect of the relief it seeks is not prospective,

but that the proceeding whose decision plaintiff seeks to enjoin the state from enforcing is over.

Of the three *Middlesex* factors to be considered in determining whether *Younger* abstention is appropriate, the first – the existence of a pending state proceeding – is the most hotly contested by the parties in the case at bar. It is also the most complex. Because the analysis of this element depends in part on, and follows logically from, the analyses of the second and third *Middlesex* factors – the vindication of important state interests and the availability of an adequate opportunity to raise constitutional claims – these latter two elements will be discussed first.

Important State Interests

As the magistrate documents at pages 1531-32 of his report, the courts have recognized wide-ranging interests in the many cases in which *Younger* has been applied. The Supreme Court has never held a state interest to be unimportant, and only a few lower courts have so held. Note, *Slogan or Substance? Understanding "Old Federalism" and Younger Abstention*, 73 Cornell L.Rev. 852, 873-74 (May 1988) (citing *Texaco, Inc. v. Pennzoil*, 784 F.2d 1133, 1150 (2d Cir.1986) (state interest in bond provision relatively minor), *rev'd*, 481 U.S. at 1, 107 S.Ct. at 1519; *Mobil Oil Corporation v. City of Long Beach*, 772 F.2d 534, 542 (9th Cir.1985) (state suing in proprietary not sovereign capacity and seeking only money damages)); *see also W.C.M. Window Company, Inc. v. Bernardi*, 730 F.2d at 490 (interest in employment of state residents that underlies state preference law not as central to state goals as protection of health, safety and morals; but decision not to abstain

based on fact that three plaintiffs could not join state proceeding); *First Alabama Bank of Montgomery, N.A. v. Parsons Steel, Inc.*, 825 F.2d 1475, 1482-83 (11th Cir. 1987) (minimal state interest as adjudicator of wholly private dispute between private parties).

The instant case involves an alleged conflict between the state's interest in regulating the statewide business of insurance and the federal interest in overseeing nationwide corporate takeovers and in protecting interstate commerce. As the magistrate demonstrates at pages 1533-35 of his report, the factors defendant is required to take into account in ruling upon a request to acquire control shares under Wis.Stat. § 611.72 are not unrelated to the state's legitimate regulatory concerns for the solvency of domestic insurance companies and foreign insurance companies licensed to write insurance in Wisconsin, and for Wisconsin policyholders. I agree with the magistrate's conclusion that this statute implicates the state's interest in ensuring the financial stability of companies that offer insurance to state residents, and that this interest is substantial. Whether, in light of the federal interest in the non-insurance aspects of the transaction at issue, the state is entitled or authorized to effectuate this interest as provided for under the contested statutes goes to the merits of this action and need not (and should not) be decided in order to find the existence of important state interests for *Younger* abstention purposes.

Plaintiff's contention that the state's interests are minimal because there has been no violation of state law, the state has not initiated any enforcement proceeding, ant the relief requested will not operate directly against any state court, *see Evans v. City of Chicago*, 689 F.2d 1286,

1294 (7th Cir. 1982) (noting that as of 1982 "the exceptional *Younger* progeny which did not involve pending state initiated proceedings abstained from considering relief which would operate directly against a state court") is based on a narrow reading of this element of the *Middlesex* test that may be inferred from the early *Younger* cases but is not borne out by more recent cases. *See Pennzoil,* 481 U.S. at 12-14, 107 S.Ct. at 1526-28; *W.C.M. Window,* 730 F.2d at 490 (protecting health, safety and morals of state residents is the type of interest involved in cases where *Younger* abstention has been ordered); and cases collected at 1532 n. 26 of the magistrate's report.

Plaintiff contends that the McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. §§ 1011-1015, cannot be used to supply the important state interest in this case because application of the Act is in dispute and goes to the merits of the case. This contention is equally unavailing. The finding of an important state interest need not be supported by federal statute, and the concerns for state policy holders that are reflected in state statutes and in the conclusions of law made in defendant's order denying plaintiff's application for approval of the proposed acquisition suffice to establish the state's important interest in the consequences for state residents of the acquisition of a domestic insurer.

Competent Forum/Adequate Opportunity to Raise Federal Claims

A federal plaintiff has an adequate opportunity to raise constitutional challenges to a state proceeding before a state tribunal if such challenges may be heard in the challenged proceeding itself or in state court judicial

review (either trial or appellate) of the proceeding, regardless whether the federal plaintiff seeks such review. *Pennzoil*, 481 U.S. at 15-17, 107 S.Ct. at 1528-29 (federal plaintiff's challenge to Texas bond provision could have been raised in trial court that entered judgment against plaintiff, and plaintiff could not escape *Younger* abstention by failing to do so); *Dayton*, 477 U.S. at 629, 106 S.Ct. at 2724 (where Dayton sought injunction against continuation of administrative proceedings on sex discrimination claims, it was sufficient for *Younger* abstention purposes that Dayton's constitutional claims could be raised in state court review of those proceedings); *Middlesex*, 457 U.S. at 432-34, 102 S.Ct. at 2521-22 (where state ethics committee served formal statement of charges on lawyer who instead of filing answer filed suit in federal court, and disciplinary proceedings were subject to state court review, *Younger* abstention held appropriate); *Huffman*, 420 U.S. at 608-11, 95 S.Ct. at 1210-12; *Foster v. Zeeko*, 540 F.2d 1310, 1320 (7th Cir. 1976); *Fore Way Express, Inc. v. Wisconsin Department of Industry, Labor and Human Relations*, 660 F.Supp. at 311.

Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973), is somewhat inconsistent with this articulation of the adequate opportunity factor. In *Gibson*, the Court stated that the fact that judicial review was forthcoming at the conclusion of the challenged administrative proceeding was irrelevant where the administrative tribunal itself was not competent because of bias, one of the exceptions to *Younger*. *Id.* 411 U.S. at 577, 93 S.Ct. at 1697. Under *Dayton*, 477 U.S. at 629, 106 S.Ct. at 2724, and *Middlesex*, 457 U.S. at 432-34, 102 S.Ct. at 2521-22, it would appear that such incompetence would be corrected

by the availability of review. However, bias was not an issue in those cases, and it is not raised by plaintiff in the case at bar. Moreover, administrative tribunals in general are normally not competent to hear claims that statutes are unconstitutional. *See, e.g., Weinberger v. Salfi*, 422 U.S. 749, 765, 95 S.Ct. 2457, 2466, 45 L.Ed.2d 522 (1975) (issue of constitutionality of statutory requirement is beyond Secretary's jurisdiction to determine); *Metropolitan Life Insurance Company v. Board of Directors*, 572 F.Supp. 460, 468 (W.D.Wis. 1983) (state administrative body may not rule on constitutional challenges to the statutes under which it operates). It would be contrary to the holdings in post-*Gibson* cases such as *Dayton*, 477 U.S. at 619, 106 S.Ct. at 2718, and *Middlesex*, 457 U.S. at 423, 102 S.Ct. at 2515, to interpret *Gibson* to extend beyond bias and to bar *Younger* abstention wherever the administrative tribunal is not competent to hear constitutional claims, regardless of the opportunity to raise those claims in state courts upon review of the tribunal's decision.

As explained in the magistrate's report at 1528-29, Wis.Stat. §§ 227.53-.58 provide for judicial review by state trial and appellate courts of administrative hearings, and for the consideration of constitutional challenges in the course of such review. Accordingly, I agree with the magistrate's conclusion that the state proceedings set in motion by the statutorily required application and hearing at issue in the case at bar provide plaintiff with an adequate opportunity to raise in a competent state tribunal the federal defenses raised in this action.

Pending State Proceeding

The existence of a pending state proceeding is necessary to trigger *Younger* abstention and is the critical issue

to be determined on this motion. Indeed, it is to this issue that most of plaintiff's objections to the magistrate's report are addressed.[3] The magistrate found that the completed hearing in the instant case was part of an "adjudicative continum" because it is subject to rehearing and judicial and appellate review. Plaintiff objects that the availability of appellate review relates to the adequate opportunity factor of the *Middlesex* test, that no comity concerns are implicated when the administrative hearing is over, and that if, as in this case, a completed administrative proceeding is held to be "pending," then no party to a state administrative proceeding can ever raise federal claims in federal district court and federal plaintiffs will be forced to bypass state administrative agencies in order to get into federal district court. These objections will be addressed in the course of the analysis that follows.

Whether the state proceeding in question is pending is not an issue when the proceeding is in state court or before an administrative tribunal for a decision and is actually ongoing at the time the federal action is commenced or before there is substantial advancement in the federal action. *Dayton*, 477 U.S. at 627-28 n. 2, 106 S.Ct. at

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[3] Plaintiff's other objections are directed at the magistrate's analysis of the important state interest factor and are disposed of at page 1514 above. Plaintiff's one remaining objection, that state courts are inadequate to resolve multistate federal constitutional challenges (despite the fact that federal courts in different circuits can no better guarantee uniformity), may be relevant to choice of forum but does not refute the *Younger* principle that federal courts should not interfere with state application and prosecution of state laws and the related proposition that state courts are competent to evaluate the constitutionality of state laws.

2723-24 n. 2. The problem arises when the state proceeding has yielded a decision and is no longer ongoing when the federal action is filed.

When the state proceeding is in a trial court and the court has entered judgment, the proceeding is apparently considered to pending for *Younger* abstention purposes.[4] The reasoning for such a determination is unclear. In *Huffman*, 420 U.S. at 592, 95 S.Ct. at 1200, the first case in which the Court addressed the "pending" element where the state proceeding had ended, the Court applied to state trial proceedings only the requirement that the federal plaintiff continue through state appellate remedies before seeking relief. *Id.* at 608, 95 S.Ct. at 1210. The Court stated that the fact that the federal plaintiff may no longer be able to appeal is irrelevant. *Id.* at 611 n. 22, 95 S.Ct. at 1211 n. 22. The Court seems to have based this requirement on the availability of a competent state tribunal to decide the federal issues, *id.* at 594, 605, 95 S.Ct. at 1203, 1208, a consideration that was incorporated in subsequent cases in the adequate opportunity factor of the *Middlesex* test. *See* cases cited in preceding sections; *see also Brown v. Scott*, 462 F.Supp. 518, 521 (N.D.Ill. 1978) (opportunity to raise federal claims in state court, either on appeal or review, did not change threshold *Younger* requirement that state court proceeding be pending).

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[4] In *Pennzoil*, 481 U.S. at 1, 107 S.Ct. at 1519, the Supreme Court did not address whether the state proceeding was pending, perhaps because judgment was entered by the trial court after the federal action was filed. *Id.* at 17, 107 S.Ct. at 1529 (judgment entered later the same day).

The distinction made in *Huffman* between state court and administrative proceedings was eliminated when the Supreme Court extended *Younger* to administrative proceedings in *Middlesex* and *Dayton*. In those cases the proceedings at issue were ongoing and so the Court did not reach the question whether they were pending. The Court based its decision to extend *Younger* on its determination of the other two factors of the *Middlesex* test, the implication of important state interests and the availability of an adequate opportunity to raise federal claims in the course of judicial review.

In *Middlesex* and *Dayton*, the Court also stated that the *Younger* concerns of comity and federalism are as applicable to pending civil proceedings as to pending criminal prosecutions. 457 U.S. at 432, 102 S.Ct. at 2521; 477 U.S. at 627, 106 S.Ct. at 2723. However, these principles are not directly applicable to administrative proceedings, ongoing or completed, where, as here and in most other instances, the administrative tribunal has no authority to decide the federal plaintiff's constitutional challenges. As plaintiff notes in its objections to the magistrate's report, where the constitutional challenges cannot be entertained, there is no disruption of the pending proceeding because no issue that could be decided is being reopened, and there is no duplication of separate legal proceedings addressing identical issues because the constitutional issues are not within the state forum's jurisdiction. *See Steffel v. Thompson*, 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 39 L.Ed.2d 505 (1974). There is also no disrespect even though the state court could hear the constitutional claims if the federal plaintiff instituted a

proceeding in state court, because there is no requirement that § 1983 actions must first be filed in state court.[5]

However, *Middlesex* and *Dayton* appear to require that where an administrative proceeding has taken place, even though the federal plaintiff was not required to *initiate* an action in state court, he or she must *continue* in state court. The reason for this is that even if the administrative tribunal may not decide constitutional claims, the state court may and the federal court's intervention would reflect negatively on the state court's ability to enforce constitutional principles in the course of its review of the administrative proceeding. This concern with the showing of disrespect for the state court that can

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[5] The Supreme Court has been careful to include disclaimers against the erosion of the § 1983 exemption from the exhaustion of remedies requirement even as it has narrowed that exemption by its expansive application of *Younger* to non-criminal, non-ongoing, proceedings, *See, e.g., Dayton*, 477 U.S. at 627-28 n. 2, 106 S.Ct. at 2723-24 n. 2; *Huffman*, 420 U.S. at 610 n. 21, 95 S.Ct. at 1211 n. 21; *Bethune Plaza*, 863 F.2d at 529. Although the Court's cryptic assurances that the § 1983 exhaustion of remedies exemption remains intact may be belied by the practical effect of recent *Younger* decisions, it is still true that a federal plaintiff is not required to initiate either state administrative or judicial remedies prior to bringing a § 1983 suit in federal court. Indeed, as is made clear in the remainder of this order, it is only when federal plaintiffs do not initiate proceedings before state administrative tribunals or in state trial courts, and instead file a § 1983 action in federal court before such proceedings are initiated against them, that their right to sue under § 1983 in federal district court is preserved. *See People of State of Illinois v. General Electric Company*, 683 F.2d 206 (7th Cir. 1982) (*Younger* abstention held inappropriate where state began enforcement proceeding *after* General Electric filed suit in federal court).

review the administrative proceeding may be attenuated, but it applies whether the administrative proceeding is ongoing or completed at the time the federal suit is filed.

The competency of the state tribunal to decide constitutional claims is a critical distinction between administrative and court proceedings. Based on that distinction, it could be concluded that unlike a completed trial a completed administrative hearing should not trigger *Younger* abstention, because whereas the federal plaintiff could have raised constitutional claims at trial such claims could not have been considered in the administrative hearing. However, this distinction exists even where the administrative proceeding has not yet ended – even where it is ongoing the federal plaintiff's constitutional claims may not be decided until judicial review of the hearing. Nevertheless, this distinction has not prevented the Supreme Court from applying *Younger* to ongoing administrative hearings. *See Dayton*, 477 U.S. at 619, 106 S.Ct. at 2718; *Middlesex*, 457 U.S. at 423, 102 S.Ct. at 2515. Because this distinction cannot be used to hold *Younger* applicable to ongoing administrative proceedings but not to completed administrative proceedings, there is no basis for using this distinction to hold *Younger* applicable to completed trials but not to completed administrative proceedings.

It appears that, where the Supreme Court has found that important state interests are involved in the administrative proceeding that is being challenged, the Court has decided to defer to the state court that could review that proceeding and hear the constitutional challenges in that review – in other words, to give the state court the first

opportunity to hear claims emanating from state proceedings and challenging state laws. Because the comity concerns related to disruption and duplication are not implicated either when an administrative proceeding is pending or when it is not (see discussion above at page 1516), and because the comity concern related to disrespect is indirectly implicated both when an administrative proceeding is pending and when it is not, the determination whether *Younger* principles are implicated does not depend on whether the administrative proceeding is pending.[6] Rather, the key concern seems to be deference to state courts where the state had enforced its laws or begun to enforce them, by refraining from interfering with state court review of administrative application of state law. *See Lemon v. Tucker*, 664 F.Supp. at 1147 (*Younger* policy of noninterference with state proceedings applies where state prosecuting its laws).[7]

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[6] The irrelevance of whether the proceeding is actually ongoing at the time the federal suit is filed was foreshadowed by the statement in *Huffman* that although *Younger* turned on the fact that the state court proceeding was *pending*, the pending element was used only to distinguish proceedings that had already commenced from those that were merely incipient or threatened, and the argument that the state proceeding had ended was of no consequence. 420 U.S. at 606-07, 95 S.Ct. at 1209-10.

[7] There is some language that suggests the state proceeding must be "coercive" for this concern to be triggered. *Dayton*, 477 U.S. at 627-28 n. 2, 106 S.Ct. at 2723-24 n. 2. One factor bearing on the coercive nature of the proceeding in question is whether federal plaintiffs must raise their constitutional claims as defenses to the state proceeding. *Lemon*, 664 F.Supp. at 1147 (federal plaintiffs are not in a coercive posture when they are

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In sum, just as the statutory availability of appellate review renders a completed trial pending for *Younger* purposes, *Huffman*, 420 U.S. at 607-611, 95 S.Ct. at 1209-12, so the availability of judicial review renders a completed administrative proceeding pending, because the same *Younger* concerns that apply to ongoing administrative proceedings apply to ended administrative proceedings. This means that state proceeding (not tainted by bias, bad faith or harassment) for which the state offers statutory appellate review through its courts or otherwise is pending for *Younger* purposes from the time it is initiated, as long as the federal action is filed after such initiation, until it has completed the review process.[8]

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the state plaintiffs, or "prosecutors," seeking to obtain affirmative remedies from a state agency). That plaintiff in the instant case would have had to raise its federal claims as defenses to the hearing it challenges suffices to bring the state's interest in enforcing its laws to bear.

[8] Until the Supreme Court applied *Younger* in *Pennzoil*, 481 U.S. at 1, 107 S.Ct. at 1519, to a state proceeding in which the state was not a party, most courts held that *Younger* abstention may apply only to a "state-initiated adjudication pending in a state forum." *See, e.g., Jordi v. Sauk Prairie School Board*, 651 F.Supp. 1566, 1575 (W.D.Wis. 1987) (citing *Evans v. City of Chicago*, 689 F.2d 1286, 1294 (7th Cir. 1982)). In the instant case, the fact of which party initiated the challenged hearing is disputed. Plaintiff avers that it initiated the administrative proceeding by submitting its application for approval of its proposal to purchase St. Paul Companies. However, as defendant notes, plaintiff was required by state law to submit the application, and defendant called the hearing in response to the application pursuant to the same state law. Thus, plaintiff initiated the adjudicatory process to which I conclude *Younger*

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At that point, the federal plaintiff may be barred by the principle of *res judicata* from pursuing his or her claims, and may be able to proceed only by writ of certoriari to the United States Supreme Court. The Court of Appeals for the Seventh Circuit has said as much in rather expansive dicta in *Bethune Plaza*, 863 F.2d at 528-29:

> A state is entitled to continue in its own courts (or administrative tribunals, for there is no sharp distinction between a state "court" and a state "adjudicatory agency") litigation begun there, without having the suit under § 1983 serve as a form of federal-defense removal. . . . If the state's tribunal is competent to resolve the federal defense, then the litigation must continue in that forum.[9]

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applies, and defendant initiated the actual proceeding that I conclude triggered the application of *Younger*, but it was state law that prompted either or both parties to set in motion the process that I have found implicates the important state interests that bring the *Younger* concerns to bear. In any case, whether the state initiated the process seems to be irrelevant after *Pennzoil*.

[9] In *City Investing Company v. Simcox*, 633 F.2d 56, 60 n. 10 (7th Cir. 1980), the Seventh Circuit Court of Appeals expressed a somewhat different view of the role of federal district courts: The rule of this circuit is that "[a]bstention from the exercise of federal jurisdiction . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it . . . [and is to be applied] only in exceptional circumstances where the order of the parties to repair to the State court would clearly serve an important countervailing interest." (Quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959)). The court's more expansive 1988 view of *Younger* abstention as expressed in *Bethune Plaza*, 863 F.2d at 528-529, reflects the Supreme Court's steady extension of *Younger* over the last decade.

Thus, *Younger*, as steadily broadened by the Supreme Court, now operates to deny the party brought before an administrative tribunal the opportunity to choose a forum for challenging the proceeding when it is over, and to confine § 1983 actions challenging administrative proceedings to state courts. Such a result significantly erodes "the paramount role Congress has assigned to the federal courts to protect constitutional rights," *Steffel*, 415 U.S. at 473, 94 S.Ct. at 1222, despite the Supreme Court's avowed adherence to the § 1983 exhaustion exemption that preserves this paramount role. Plaintiff fails to suggest, and I am unable to find, any justifiable means of reconciling such avowals with the Court's rulings that the availability of state judicial and appellate review suffices to trigger *Younger* abstention, in order to avoid this far-reaching result.

Accordingly, I am constrained to find that the challenged hearing in the instant case is pending for purposes of *Younger* abstention. Having also found that the hearing implicates important state interests and presents plaintiff an adequate opportunity to raise its constitutional claims in the course of judicial review, I conclude that abstention on *Younger* grounds is appropriate,[10] and I will adopt the

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[10] The district courts in Indiana and North Dakota have concluded to the contrary and declined to abstain in actions identical to the instant action brought by this plaintiff before those courts. *Alleghany Corporation v. Eakin*, No. I.P. 88-561-C (S.D.Ind. Jan. 30, 1989) and *Alleghany Corporation v. Pomeroy*, 698 F.Supp. 809 (D.N.D. 1988). As noted in the magistrate's report at p. 1533 n. 29, the decision by the North Dakota court in *Alleghany Corporation v. Pomeroy* is inapposite because the

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court found that constitutional challenges could not be raised on judicial review of the Commissioner's decision under North Dakota statutes, and therefore one of the *Middlesex* factors was not present. *Id.* at 812-13.

> In *Alleghany Corporation v. Eakin*, the district court in Indiana found *Younger* inapplicable, reasoning that there was no pending proceeding because the plaintiff had received a final determination on its application at the concluded hearing, even though the plaintiff "could have availed itself of judicial review of the denial of its application in the Indiana state courts. . . ." *Id.* at 7. The court relied primarily on *Thomas v. Texas State Board of Medical Examiners*, 807 F.2d 453, 456-57 (5th Cir. 1987), and *People of State of Illinois v. General Electric Company*, 683 F.2d 206 (7th Cir. 1982). As discussed in the magistrate's report at pp. 28-30, *Thomas* may be distinguished by the existence of certain elements, such as the request for damages and the charge of a personal vendetta, that would make *Younger* abstention inapplicable even if the administrative proceeding had been ongoing. More important, the finding in *Thomas* that the availability of state court review did not render *Younger* abstention inappropriate is contrary to the United States Supreme Court's application and extension of *Younger* as discussed in this order.
>
> Like *Thomas*, *General Electric*, 683 F.2d at 206, is also distinguishable from the instant case and the force of its reasoning has been diluted by subsequent Supreme Court cases. In *General Electric*, where the court declined to abstain when General Electric sued in federal court for a declaratory judgment that an Illinois law was unconstitutional, General Electric had not yet been brought before any state tribunal. The state began its enforcement proceedings a few

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Magistrate's Report and Recommendation as supplemented by my own conclusions of law as set forth above.[11]

Order

IT IS ORDERED that the Magistrate's Report and Recommendation is adopted as supplemented by the

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hours after General Electric commenced its suit in federal court. *Id.* at 208. (Under *Dayton*, 477 U.S. at 627-28 n. 2, 106 S.Ct. at 2723-24 n. 2, such a sequence might no longer suffice to render *Younger* abstention inapplicable because the state proceeding was initiated before the federal action had substantially advanced.)

However, more important to the court than the order of the suits was whether a state statute had been violated. *Id.* at 212-13. As in the instant case, the federal plaintiff had not violated state law when it filed suit in federal court. The federal plaintiff had also not yet violated the state law it was challenging in *Pennzoil*, 481 U.S. at 1, 107 S.Ct. at 1519, yet the Supreme Court held *Younger* abstention to be appropriate nevertheless because of the importance of the state interests implicated by that law. *Id.* at 12-14, 107 S.Ct. at 1526-28. Thus, the lynchpin of the *General Electric* decision is no longer required for *Younger* to apply, and the analysis in more recent cases weakens *General Electric's* precedential value. Even so, the court in *General Electric* anticipated the subsequent trend in *Younger* case law when it stated that "it is unseemly to allow a single federal district judge to enjoin a state statute." *Id.* at 213.

[11] However, I do not agree with the statement in the Magistrate's report at 41 that "[t]o hold otherwise would render the [*Younger*] doctrine a virtual nullity."

findings of fact and conclusions of law set forth in this order, and that defendant's motion to dismiss this case is GRANTED.

REPORT AND RECOMMENDATION

JAMES GROH, United States Magistrate.

Plaintiff, Alleghany Corporation (Alleghany), brings this action for declaratory judgment seeking a determination that Wis.Stats. §§ 611.72 and 617.12 are unconstitutional and for injunctive relief to prohibit defendant Commissioner of Insurance from enforcing them. Those sections prohibit, *inter alia*, the execution of any plan for the acquisition of control (as defined in Wis.Stats. § 600.03(13)) of any domestic stock insurance company, or its parent holding company wherever organized, without the approval of the defendant.

Alleghany seeks to acquire presumptive control (in excess of ten percent of the common stock) of the St. Paul Companies, Inc. (ST. PAUL), a publicly-trade insurance holding company domiciled in Minnesota, through purchases on the open market. ST. PAUL's principal (and wholly-owned) subsidiary is St. Paul Fire & Marine Insurance Company (FIRE & MARINE), a Minnesota corporation. FIRE MARINE, in turn has a wholly-owned subsidiary incorporated in Wisconsin, St. Paul Fire and Casualty Insurance Company (FIRE & CASUALTY). After application and hearing, in conformity with the applicable state statutes and regulations, the Commissioner denied Alleghany's request. (Cmpl.Ex. C) Alleghany did not pursue the statutory review procedure through the Wisconsin courts. Wis.Stats §§ 227.48, .49 and .53. Instead,

Alleghany filed this action which is now before the court on the Commissioner's motion to dismiss the complaint under the abstention doctrines of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) and *Burford v. Sun Oil, Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). (Dkt. #6) This report and recommendation, submitted pursuant to 28 U.S.C. § 636(b)(1)B), recommends that the motion be granted.[1]

FINDINGS OF FACT

For the purpose of deciding this motion only, I find the following facts from the well-pleaded allegations of the complaint. (Dkt #1):

1. The plaintiff, Alleghany Corporation, is a Delaware corporation with its principal place of business in New York, New York. It is a publicly-held company whose common stock is listed and traded on the New York Stock Exchange. (Cmpl. ¶ 3)

2. The defendant, Robert D. Haase, is the Commissioner of Insurance of the State of Wisconsin. As such, he has the duty to administer and enforce the insurance laws of Wisconsin, including those pertaining to transfers of control of insurance companies. (Cmpl. ¶¶ 1,4; Wis.Stat.

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[1] St. Paul Fire & Casualty Ins. Co. and St. Paul Companies, Inc., respectively, the Wisconsin insurer and its grandparent (the direct object of plaintiff's acquisition effort) have filed a motion for leave to intervene. (Dkt. #3) Defendant (Dkt. #22), plaintiff (Dkt. #8), and the intervenors (Dkt. #27) have all filed motions for summary judgment as well. The disposition of the instant motion renders consideration of the other motions unnecessary.

§ 601.41(1)). Defendant is a resident of the Western District of Wisconsin. (Cmpl. ¶ 6)

3. In July, 1987, Alleghany began to acquire, on the open market, common stock of The St. Paul Companies, Inc. (ST. PAUL), an insurance holding company incorporated and domiciled in Minnesota whose common stock is quoted on the NASDAQ National Market System and is registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78a *et seq.*). (Cmpl. ¶ 7)

4. St. Paul Fire and Casualty Insurance Company (FIRE & CASUALTY), a Wisconsin corporation, is wholly-owned subsidiary of St. Paul Fire and Marine Insurance Company (FIRE & MARINE), a Minnesota corporation, which, in turn, is a wholly-owned subsidiary of ST. PAUL. (Cmpl. ¶ 18)

5. As a result of its purchases, Alleghany owns, directly or indirectly, approximately 9.2 percent of ST. PAUL's outstanding common stock and seeks to acquire over 10 percent of the common stock through further open market purchases. (Cmpl. ¶ 7)

6. Alleghany's acquisition of shares of ST. PAUL is subject to the Williams Act, 15 U.S.C. §§ 78m(d), (e) and 78n(d)-(f). Alleghany filed a Schedule 13D with the Securities Exchange Commission discussing its plans and proposals regarding control and changes in the business of ST. PAUL upon acquiring more than 5 percent of ST. PAUL's stock as required by the Williams Act and regulations issued thereunder. (Cmpl. ¶¶ 37, 38 and 40; 15 U.S.C. § 78n(d)(1); 17 CFR § 240.13d-1.[2]

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[2] There is no allegation that Alleghany has initiated, or intends to initiate, a tender offer, so the provisions of Section 14(d) (15 U.S.C. § 78n(d)) have not been engaged.

7. Forty-seven states, including Wisconsin and Minnesota, have adopted similar statutes reserving to the Commissioner of Insurance, or equivalent official, the authority to approve or disapprove a proposed acquisition or control of a domestic insurance company or its parent holding company, and to require the filing of a disclosure statement and a hearing before the appropriate insurance official in advance of such acquisition. The ownership of more than 10 percent of the voting securities of such a company creates a rebuttable presumption of control. (Cmpl. ¶¶ 13, 20, Wis.Stats. §§ 600.03(13), 611.72(2) and (3), and 617.12) (hereinafter sometimes collectively referred to as "the Act" are "the Wisconsin Act").[3]

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[3] Aside from noting the similarity of the statutes, the complaint does not cite the specific statutes of any states other than Wisconsin. The legislation appears to have had its origins in the Model Insurance Holding Company System Regulatory Act adopted by the National Association of Insurance Commissions in 1969. 2 Proc. NAIC, p. 735-738. See Cmpl.Ex.A, p. 22-24.

Wis.Stat. § 600.03(13) defines control:

> (13) "Control" means that possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, by common management or otherwise. A person having a contract or arrangement giving that person control is deemed to be in control despite any limitations placed by law on the validity of the contract or arrangement. There is a rebuttable presumption of control if a person directly or indirectly owns, holds with the power to vote or holds proxies

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7. On November 12, 1987, Alleghany filed its Form A Statement Regarding the Acquisition of Control of a

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to vote more than 10% of the voting securities of another person, except that no person shall be presumed to control another person solely by reason of holding an official position with that person. "Control" has the same meaning in the terms "controlling", "controlled by" and "under common control with". See also "affiliate".

Wis.Stat. § 600.03(1) defines affiliate:

(1) "Affiliate" of a person means any other person who controls, is controlled by, or is under common control with, the first person. A corporation is an affiliate of another corporation, regardless of ownership, if substantially the same group of persons manage the 2 corporations.

Wis.Stat. § 611.72 states, in pertinent part:

(2) Approval required. No proposed plan of merger or consolidation under ss. 180.62 to 180.685 and 180.72 *or other plan for acquisition of control may be submitted to the shareholders of any domestic stock insurance corporation or its parent insurance holding corporation* participating in the transaction or *executed unless it has been approved by the commissioner.* [emphasis added]

(3) Grounds for disapproval. The commissioner shall approve the plan if the commissioner finds, after hearing, that it would not violate the law or be contrary to the interests of the insured of any participating domestic corporation or of the Wisconsin insureds of any participating nondomestic corporation and that:

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Domestic Insurer (ST. PAUL) with the Minnesota Commissioner of Commerce. A hearing was held before an

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(a) After the change of control, the domestic stock insurance corporation or any stock insurance corporation controlled by the insurance holding corporation would be able to satisfy the requirement for the issuance of a license to write the line or lines of insurance for which it is presently licensed;

(b) The effect of the merger, consolidation or other acquisition of control would not be to create a monopoly or substantially to lessen competition in insurance in this state;

(c) the financial condition of any acquiring party is not likely to jeopardize the financial stability of the domestic stock insurance corporation or its parent insurance holding corporation, or prejudice the interests of its Wisconsin policyholders;

(d) The plans or proposals which the acquiring party has to liquidate the domestic stock insurance corporation or its parent insurance holding corporation, sell its assets, or consolidate or merge it with any person, or make any other material change in its business or corporate structure or management are fair and reasonable to policyholders of the domestic stock insurance corporation or in the public interest; and

(e) The competence and integrity of those persons who would control the operation of the domestic stock insurance corporation are such that it would be in the interest of the policyholders of the corporation and of the public to permit the merger or acquisition of control.

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administrative law judge on December 16 and 17, 1987, at which an extensive record was developed. On January 11, 1988, the Deputy Commissioner of Commerce adopted the recommendation of the administrative law judge that Alleghany be permitted to acquire up to 20 percent of ST. PAUL's stock, with any additional purchases to be made only after obtaining further approval from the Commissioner. (Cmpl. ¶¶ 8-11 and Exs. A, p. 22, and B, p. 17) The order of the Deputy Commissioner is under review in the Minnesota courts. (Cmpl. ¶ 12)[4]

9. The State of Wisconsin also asserts the independent and separate authority to approve or disapprove of Alleghany's proposal to purchase over ten percent of ST.

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* * *

Wis.Stat. § 617.12 states:

> Any person attempting to acquire control over a domestic insurer shall be subject to the same duties with respect to reports and replies to the commissioner as are provided by law for the insurer, to the extent reasonably necessary to carry out the purposes of this chapter, and shall be subject to the jurisdiction of the commissioner and the courts of this state for the enforcement of such duties. Section 617.12 was repealed, effective March 25, 1988, by 1987 Wis.Act 167 ¶¶ 5, 10 and consolidated with Section 617.11 governing reports on insurer affiliates. This change has no apparent effect on the issues in this case.

[4] The complaint does not reveal by whom the review was sought or the issues presented for review. It is clear, however, that ST. PAUL opposed the application in the administrative proceedings. (Cmpl. ¶¶ 9 and 11 and Ex. A, p. 1, 22)

PAUL's stock because ST. PAUL's sub-subsidiary, FIRE & CASUALTY, is incorporated in Wisconsin. (Cmpl. ¶¶ 17, 19 and 20 and statutes at n. 3, *supra*) Alleghany does not seek to acquire the shares of FIRE & CASUALTY itself, which would continue to be the wholly-owned subsidiary of FIRE & MARINE. (Cmpl. ¶¶ 18 and 21.)

10. In 1987, approximately two percent of ST. PAUL's insurance premiums came from Wisconsin. FIRE & CASUALTY accounts for approximately three percent of ST. PAUL's premium and less than one-tenth of one percent of ST. PAUL's admitted assets. FIRE & MARINE reinsures the policies written by FIRE & CASUALTY.

11. Alleghany filed an Insurance Holding Company Registration Statement with the Wisconsin Department of Insurance on November 24, 1987, pursuant to Wis.Stats. §§ 611.72 and 617.12 and regulations promulgated thereunder. (Cmpl. ¶¶ 1, 27; s. Ins. 12.01(11) Wis.Adm.Code)

12. Defendant held a hearing on Alleghany's proposed acquisition of the stock on February 10-11, 1988, as required by Wis.Stat. 611.712(3) and s. Ins. 12.01(12)(a), Wis.Adm.Code. (Cmpl. ¶¶23 and 27).[5]

13. On April 7, 1988, defendant issued a decision and order denying Alleghany's application for approval of the proposed acquisition. (Cmpl. ¶27 and Ex. C.)[6] For his conclusions of law, defendant stated:

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[5] The hearing procedures are spelled out in the Commissioner's regulations. s. Ins. 5.01 *et seq.*, Wis.Adm.Code.

[6] This decisions and those of the Minnesota regulatory authorities (Cmpl.Exs. A & B) contain extensive findings of fact (over 40 pages) about Alleghany and ST. PAUL and the proposed acquisition.

(84) Alleghany has the burden of proof in this proceeding to show by a preponderance of the evidence that its plan of acquisition is not contrary to the interests of the insureds of any participating domestic corporation or of the Wisconsin insureds of any participating non-domestic corporation and that the five criteria specified under s. 611.72(3)(a) to (e), Wis. Stat., are fulfilled.

(85) Alleghany's plan of acquisition is contrary to the interests of the insureds of St. Paul Fire and Casualty, the Wisconsin insureds of St. Paul, and the public.

(86) Alleghany has failed to sustain its burden to show that the effect of the acquisition of control would not be to create a monopoly or substantially to lessen competition in insurance in this state.

(87) Alleghany has failed to sustain its burden to show that its financial condition is not likely to jeopardize the financial stability of the domestic stock insurance corporation or its parent insurance holding corporation, or prejudice the interests of its Wisconsin policyholders.

(88) Alleghany has failed to sustain its burden to show that the plans or proposals which it has to liquidate the domestic stock insurance corporation or its parent insurance holding corporation, sell its assets, or consolidate or merge it with any person, or make any other material change in its business or corporate structure or management are fair and reasonable to policyholders of the domestic stock insurance corporation or in the public interest.

(89) Alleghany has failed to sustain its burden to show that the competence and integrity of those persons who would control the operation of the domestic stock insurance corporation

> or its parent insurance holding corporation are such that it would be in the interest of the policyholders of the corporation and of the public to permit the acquisition of control.
>
> (90) The Commissioner has the authority under the McCarran-Ferguson Act, 15 U.S.C. ss. 1011-1015, to deny Alleghany's petition.

(Cmpl. Ex. C, p. 21)[7]

14. Shares of ST. PAUL common stock are traded in interstate commerce. The effect of defendant's order is to prevent Alleghany from making further purchases of ST. PAUL common stock outside the State of Wisconsin through public trades with sellers located outside Wisconsin. (Cmpl. ¶¶ 2, 30)

15. Eight other states have asserted a similar statutory right to approve Alleghany's proposed purchase of over 10 percent of ST. PAUL's shares – California, Indiana, Nebraska, North Dakota, New York, Texas, Delaware, and Illinois. Alleghany has filed applications for approval in all these states and hearings were held in Indiana, Nebraska, North Dakota and Texas. Live testimony was permitted or required at all hearings (including Wisconsin), all of which were held after the Minnesota hearing. (Cmpl. ¶¶ 13 and 14) After a contested proceeding, California approved the acquisition of up to 20 percent of ST. PAUL's stock. The Insurance

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[7] The decision also notified Alleghany of its right, within 30 days, to petition for a rehearing pursuant to Wis.Stat. § 227.49 or to seek judicial review in Wisconsin Circuit Court under Wis.Stat. § 227.53 (Ex.C. at 22-23) Plaintiff concedes that it did not seek relief or review under these provisions. (Brief at 4, Dkt. # 15)

Commissioners of Indiana, North Dakota, and Nebraska have disapproved the applications.[8]

16. This action was filed April 28, 1988. This court has jurisdiction over the action pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). Venue is proper pursuant to 28 U.S.C. § 1391.

CONCLUSIONS OF LAW

Introduction

The focal issues in this action for declaratory and injunctive relief are whether Wis.Stats. §§ 611.72 and 617.12 are unconstitutional under the Supremacy Clause and the Commerce Clause of the United States Constitution (Art. VI, cl. 2 and Art. I, § 8, cl. 3).[9] The purpose and

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[8] Notice may be taken of later developments in other jurisdictions. Federal court challenges to the constitutionality of the state statutes have been filed in Nebraska and North Dakota. *Alleghany Corp. v. McCartney*, No. CV-88-L-235, *Alleghany Corp. v. Pomeroy*, No. A1-88-096. Motions to dismiss on abstention grounds were filed in each case. The motion was granted in *McCartney*, on October 18, 1988, and the opinion appears at Docket No. 47. The motion was denied in *Pomeroy*, 698 F.Supp. 809 (Opinion at Docket No. 35A) and 700 F.Supp. 460 on October 28, 1988, the district court found the North Dakota statute to be an unconstitutional infringement of the Commerce Clause and granted Alleghany's Motion for Summary Judgment. (Opinion at Docket No. 50)

[9] Alleghany seeks a declaration of the constitutional invalidity of the statutes and an injunction barring defendant from invoking or enforcing them against it. Briefly stated, Count I alleges that the legislation, on its face and as applied,

(Continued on following page)

effect of this legislation is to reserve to the defendant Commissioner the authority to approve or disapprove the transfer of control of a domestic insurance company (*i.e.* one incorporated in Wisconsin; Wis.Stats. § 600.03(17)), or its parent company, wherever domiciled. In this case the Commissioner's exercise of that authority translates into a prohibition against Alleghany's further purchase of ST. PAUL shares.

The issues presented by this case are complex and far-reaching, arising as they do at the intersection of two otherwise unrelated regulatory systems, one state and the other federal – the supervision of the insurance industry and the regulation of the (interstate) market in publicly-traded securities. Although insurance is a business affecting interstate commerce, *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), Congress, in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, has reserved to the states the exclusive authority to regulate "[t]he business of insurance

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(Continued from previous page)

constitutes the impermissible state regulation of interstate commerce by regulating or prohibiting transactions in ST. PAUL's securities between non-resident buyers and sellers and by subjecting Alleghany to duplicative or inconsistent regulation. (Cmpl. ¶¶ 28-35) Count II alleges that the statutory scheme, on its face and as applied, is in direct conflict with the Williams Act which, it is alleged, has preempted the regulation of transfers of control of publicly traded corporations. (Cmpl. ¶¶ 36-42) Count III alleges that the State of Wisconsin is only minimally affected by Alleghany's purchase of ST. PAUL shares, and that its attempt to regulate the out-of-state transactions in ST. PAUL shares violates the Due Process Clause of the Fourteenth Amendment. Finally, Count IV charges that the foregoing allegations constitute a violation of 42 U.S.C. § 1983.

and every person engaged therein" in the absence of an express declaration of Congress to the contrary. 15 U.S.C. § 1012.[10] The Wisconsin legislation, defendant argues, is an exercise of that authority. Broadly stated, its putative purposes are to protect the financial condition of Wisconsin insurers to protect Wisconsin policyholders, and to foster stable markets and competition. That legislation is not an aberration. It is represented that forty-seven states have adopted it in some form, and it apparently derives from a model act endorsed by the National Association of

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[10] 15 U.S.C. § 1011 states:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1012 states, in pertinent part:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business *unless such Act specifically relates to the business of Insurance*. . . . [emphasis added]

In 15 U.S.C. § 1014 the business of insurance is expressly made subject to the National Labor Relations Act and the Fair Labor Standards Act of 1938 and the Merchant Marine Act.

Insurance Commissioners.[11] This fact contributes to the complexity of the overall controversy, at least on the surface, as eight other states (in six federal judicial circuits) have also asserted regulatory jurisdiction over Alleghany's proposed acquisition under their versions of the legislation.[12] This lawsuit, then, may be viewed as just one act in a labrynthine multi-state drama of which relatively little is (or need be) known at this juncture. Other scenes are being played out in the districts of Nebraska and North Dakota and in the state courts of Minnesota. While those proceedings are of interest, they provide no more than persuasive authority on the issues of the instant motion or the merits of Alleghany's complaint.

As noted, Alleghany's case is anchored first on Sections 13(d) and (e) and 14(d)-(f) of the Securities Exchange Act of 1934, as amended (15 U.S.C. §§ 78m(d), (e) and 78n(d)-(f), commonly referred to as the Williams Act, which Congress adopted in 1968 to regulate transfers of control of publicly traded corporations for the purpose of protecting investors. *Piper v. Chris-Craft Industries Inc.*, 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977). The thrust of Alleghany's claim is that it has done all that the Williams Act requires of it and that Alleghany's market purchases of 10%, 20% or more of ST. PAUL's shares

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[11] See note 3, *supra*. Some of the history of the Model Insurance Holding Company System Regulatory Act is recounted in the decision of the Minnesota Administrative Law Judge, who notes that the Minnesota statute was drawn from the model act. (Cmpl.Ex. A, pp. 23-25)

[12] See Finding 15, *supra* p. 1523.

would be lawful and proper in all respects. As the Wisconsin legislation permits the Commissioner to bar further purchases (as he has done here), or otherwise impair or impede the acquisition process, it is in direct conflict, Alleghany argues, with the letter and the purpose of the federal legislation and must be seen as having been preempted by it.

The question of a state's supervisory powers with respect to corporate takeovers generally is one of considerable consequence, and has been visited, with mixed results, at least three times by the Supreme Court in the past few years. *Leroy v. Great Western United Corp.*, 443 U.S. 173, 99 S.Ct. 2710, 61 L.Ed.2d 464 (1979) (involving Idaho takeover legislation – decided on venue grounds); *Edgar v. Mite Corp.*, 457 U.S. 624, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982) (plurality opinion voiding Illinois legislation) and *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987) (upholding Indiana legislation).[13] These same cases also presented Alleghany's other principal claim – that state attempts to regulate corporate takeovers violate the Commerce Clause.

Defendant does not dispute the existence of substantial federal constitutional questions or the jurisdiction of

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[13] The statutes in *Leroy* and *Edgar* pertained only to takeovers by tender offer. 443 U.S. at 176, n. 4, 99 S.Ct. at 2712, n. 4; 457 U.S. at 626, n. 1, 102 S.Ct. at 2632, n. 1. The Indiana statute in *CTS Corp.*, was addressed broadly to the acquisition of "control shares" in corporation incorporated in Indiana, 107 S.Ct. at 1641. None of the cases involved control of an insurance company.

this court to consider them. He urges, however, that theories of abstention fashioned by the Supreme Court are controlling the dictate the dismissal of Alleghany's complaint. For purposes of this motion, the well-pleaded, factual allegations of the complaint are taken as true. *Fore Way Exp., Inc. v. Wis. Dept. of Industry*, 660 F.Supp. 310, 311 (E.D.Wis.1987).

Our Court of Appeals has recently described "abstention" as

> the rubric applied to a congeries of statutory and judicially created doctrines which either require or intimate (more or less strongly) that a federal court not entertain a claim pressed before it. All of these doctrines are designed to afford state courts and other organs of state government a measure of respect. A few also reflect the judicial preference for avoiding unnecessary questions of constitutional law. Although the rationales differ in detail, the application of each doctrine results in the federal court declining to hear a claim, until the state court has an opportunity to address it, *e.g.*, *[Railroad Commission of Texas v.] Pullman [Co.]* 312 U.S. [496] at 501-02, 61 S.Ct. [643] at 645]-46 [85 L.Ed. 971 (1941)], or absolutely, *e.g.*, *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

Moses v. Kenosha County, 826 F.2d 708, 709 (7th Cir.1987). This unitary view of the subject, which deemphasizes the separateness of the various "doctrines", echoes the admonition of the Supreme Court in its most recent treatment of the question:

> The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of

> considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes.

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 107 S.Ct. 1519, 1526 n. 9, 95 L.Ed.2d 1 (1987).[14]

It is with these considerations in mind that I turn to defendant's specific claims that abstention is proper under either the *Younger* or *Burford* abstention doctrines. *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

I. *The Younger Doctrine*

In 1971, the Supreme Court held, in *Younger v. Harris*, that it was inappropriate for a federal judge to enjoin a pending state criminal prosecution. Over the next sixteen years that rationale has been extended to non-criminal, state administrative proceedings (see *e.g. Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986) and *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982)) and, in 1987, to litigation between purely private litigants. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987).[15]

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[14] The historical development of abstention is helpfully summarized in 17A Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction 2d* (1988) § 4241.

[15] For the evolution and application of the *Younger* rule generally, see 17 A Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* (1988), §§ 4251-4255.

In the *Pennzoil* case, Pennzoil had obtained an $11 billion judgment against Texaco in the Texas state trial court. Under Texas law, a bond of $13 billion was required as a condition of appeal. Texaco did not appeal, nor did it attempt to challenge the constitutionality of the appeal bond law in the Texas courts. Instead, it filed an action (after the jury verdict and just hours before judgment was entered) in the federal district court for the Southern District of New York to enjoin Pennzoil from enforcing the judgment, alleging violation of its rights under the Constitution and federal laws.[16] The district court granted a preliminary injunction (626 F.Supp. 250 (1986)) and the Second Circuit, affirming, made it permanent. (784 F.2d 1133 (1986)).

In reversing, the Supreme Court reaffirmed the principles upon which *Younger* was grounded, and added that abstention is obligatory under *Younger* whenever important state interests are at stake.

> The first ground for the *Younger* decision was "the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law." *Id.* [401 U.S.] at 43, 91 S.Ct. at 750. The Court also offered a second explanation for its decision:
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> > "This underlying reason . . . is reinforced by an even more vital consideration, the notion

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[16] These included the Full Faith and Credit Clause, the Commerce Clause, the Williams Act, the Securities Exchange Act of 1934, the Due Process Clause and Equal Protection Clauses of the Fourteenth Amendment, and 42 U.S.C. § 1983. *Id.* 107 S.Ct. at 1523, n. 6 and 1524.

> of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways . . . . The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.* at 44, 91 S.Ct. at 750.
>
> *This concern mandates application of* Younger *abstention not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending, if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the states and the National Government.* [citations omitted] [emphasis added]

Pennzoil Co. v. Texaco, Inc., 107 S.Ct. at 1525-26.[17]

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[17] Alleghany opens its argument (Br. p. 5; Dkt. #7) with Justice Brennan's oftquoted observation from *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976) regarding "the virtually

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Chief Justice Burger advanced a convenient three-part test for determining the applicability of *Younger* abstention in the *Middlesex County* case:

(Continued from previous page)

unflagging obligation of the federal courts to exercise the jurisdiction given them." Whatever vitality that statement may continue to have with regard to the quite different species of abstention brought to life in that case, it has been without force in the *Younger* context for some time. To the contrary

> *Younger v. Harris, supra,* and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances.
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> *Middlesex County Ethics Committee v. Garden State Bar Ass'n,* 457 U.S. at 431, 102 S.Ct. at 2520; see also *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 601, 95 S.Ct. 1200, 1206, 43 L.Ed.2d 482 (1975). Indeed, Justice Brennan has made no secret of his disagreement with the expansion of *Younger* abstension. The latest expression is found in his opinion concurring in the judgment in *Pennzoil,* in which he reiterates his view that *Younger* is generally inapplicable to civil proceedings and, particularly, actions under 42 U.S.C. § 1983. *Pennzoil,* 107 S.Ct. at 1530.
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> It should be noted that the *Younger* decision itself acknowledged that abstention would be inappropriate in the case of a statute which was in patent and flagrant violation of constitutional prohibitions in every conceivable application or upon a showing of bad faith, harrassment or other unusual circumstances. *Younger,* 401 U.S. at 53-54, 91 S.Ct. at 754-55. It has not been suggested that any of these exceptional circumstances are present here. Thus, Alleghany's suggestion that the *Younger* abstention is "extraordinary and narrow," must be viewed as somewhat overstated. (Br. p. 5)

> *first*, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; *second*, do the proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Id. 457 U.S. at 432, 102 S.Ct. at 2521. See also *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1149 (2d Cir.1986); *New Orleans Public Service v. City of New Orleans*, 798 F.2d 858, 863-864 (5th Cir.1986), *cert. denied* 481 U.S. 1023, 107 S.Ct. 1910, 95 L.Ed.2d 515 (1987); *World Famous Drinking Emporium v. City of Tempe*, 820 F.2d 1079, 1082 (9th Cir.1987). These same factors provide the framework for the *Younger* analysis in the instant case.

The first question to consider is whether the hearing provided for under Wis.Stats. § 611.72(3) and conducted by the Commissioner was part of an ongoing state judicial proceeding.

That a state administrative proceeding may be a part of an ongoing judicial proceeding is central to the Supreme Court's decisions in *Ohio Civil Rights Commission v. Dayton Christian Schools*, 106 S.Ct. at 2723-2724 and n. 2, and *Middlesex County*, 457 U.S. at 433-434, 102 S.Ct. at 2522. The proceeding must, however, be adjudicative or judicial in nature to warrant deference under the *Younger* principle. *Ohio Civ. Rights Comm.*, 106 S.Ct. at 2723, n. 2. As Judge Easterbrook recently observed:

> *Younger* and many ensuing cases protect the state's processes from premature federal interference. *A state is entitled to continue in its own courts (or administrative tribunals, for there is no*

> *sharp distinction between a state "court" and a state "adjudicatory agency"*) litigation begun there, without having the suit under § 1983 serve as a form of federal-defense removal. . . . If the state's tribunal is competent to resolve the federal defense, then the litigation *must continue* in that forum.

Bethune Plaza, Inc. v. Lumpkin, 863 F.2d 525, 528 (7th Cir.1988). [emphasis added]

Although the Supreme Court has not spelled out all that is required to render a proceeding judicial in nature,[18] it may be assumed that those proceedings which provide the type of procedural safeguards found in formal court proceedings will satisfy the requirement.[19] I find that the provisions of Ch. 227 Wis.Stats. and the Commission's Rules of procedures for Hearings (s. Ins. 5.01-5.25, Wis.Adm.Code) regarding the conduct of hearings provide for rules and procedures substantially the same as those followed in formal court proceedings, and

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[18] The Court of Appeals in *Middlesex County* thought that the Ethics Committee procedures fell short of being adjudicative in nature (643 F.2d 119, 128 (3rd Cir.1981)) but those reservations were rejected by the Supreme Court without discussion.

[19] See *Restatement (Second) of Judgments* (1982) § 83(2) and Comment (b) and (c), pertaining to the essential elements of adjudication (as found in the Federal Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* and the Model State Administrative Procedure Act) for purposes of affording preclusive effect to administrative determinations.

Alleghany has not suggested otherwise. Wis.Stats. § 601.62(2)[20]

The Wisconsin Administrative Procedure Act also provides for a rehearing upon timely petition, Wis.Stats. § 227.49, and under § 227.53, judicial review of the Commissioner's decision is available in the Circuit Court of Dane County upon the filing of a petition within thirty days of service of the decision. Further review can also be had in the state appellate courts. Wis.Stats. § 227.58. The Commissioner's decision specifically noted Alleghany's right to such a rehearing or judicial review. (Compl. Ex. C, pp. 22-23) Alleghany acknowledges that it "chose to proceed to federal court" on its constitutional claims rather than seeking a review in the state courts. (Br. p. 4)

It appearing that the hearing before the Commissioner was judicial in nature and was part of an ongoing state judicial proceeding, it is appropriate to consider next the third *Middlesex County* factor: whether the state proceedings afforded Alleghany an adequate opportunity to raise its federal claims. Alleghany has not questioned the adequacy of Wisconsin's review procedures to consider the constitutional and federal law issues raised by it, so this issue may be disposed of in summary fashion. Wis.Stat. § 227.57 sets forth the scope and standards of review. It states, in pertinent part:

> (5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a

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[20] Wisconsin has adopted the Model State Administrative Procedure Act. See note and table before 26 Wis.Stats.Anno. (1988 Supp.) § 227.01.

correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

(6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

* * *

(8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; *or is otherwise in violation of a constitutional or statutory provision;* but the court shall not substitute its judgment for that of the agency on an issue of discretion. [emphasis added]

* * *

(10) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. *The right of the appellant to challenge the constitutionality of any act or of its application to the appellant shall not be foreclosed* or impaired by the fact that the appellant has applied for or holds a license, permit or privilege under such act. [emphasis added]

It is clear from these sections that plaintiff had the right, upon state court review, to have all the federal defenses raised in the instant case heard and determined in a competent state tribunal. That is all that *Younger* requires. *Ohio Civil Rights Commission*, 106 S.Ct. at 2724.

Alleghany argues, however, that there was no "pending" judicial proceeding to be disrupted here as the Commissioner had entered his final determination. This contention does not bear scrutiny. The entire premise of *Younger* abstention is that ongoing state proceedings may not be subjected to federal interference, and it is disingenuous to suggest that a party can avoid the operation of the rule by the simple expedient of refusing to follow the state adjudicatory process to its conclusion. This is the inescapable teaching of *Huffman v. Pursue Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) where the federal plaintiff, having lost in the state trial court, abandoned its state appellate remedies and attempted to litigate its constitutional defenses in the federal court. *Id.* at 598, 95 S.Ct. at 1205.[21] In dismissing the federal complaint, the court (by Justice Rehnquist) held it of no consequence that the trial court judgment may have become final and nonappealable:

> For regardless of when the Court of Common Pleas' judgment became final, we believe that a

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[21] Actually, the Commissioner's order had not become final when Alleghany filed its federal complaint, as the thirty-day period for filing an appeal under Wis.Stat. § 227.53 had not expired. In this respect Alleghany appears to be in the same posture as the plaintiff in *Huffman* which also still had the option to appeal at the time the federal court action was filed. *Id.* at 611, n. 22, 95 S.Ct. at 1211, n. 22.

> necessary concomitant of *Younger* is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in *Younger*.
>
> Virtually all of the evils at which *Younger* is directed would inhere in federal intervention prior to completion of state appellate proceedings, just as surely as they would if such intervention occurred at or before trial. Intervention at the later stage is if anything more highly duplicative, since an entire trial has already taken place, and it is also a direct aspersion on the capabilities and good faith of state appellate courts. Nor, in this state-initiated nuisance proceedings, is federal intervention at the appellate stage any the less a disruption of the State's efforts to protect interests which it deems important. Indeed, it is likely to be even more disruptive and offensive because the State has already won a *nisi prius* determination that its valid policies are being violated in a fashion which justifies judicial abatement.

Id. 420 U.S. at 608-609, 95 S.Ct. at 1210-11. See also *World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079.

The foregoing considerations apply with the same force to the interruption of state adjudicative processes that begin with administrative adjudications.[22] That an administrative proceeding and the subsequent state court review is to be seen as an adjudicative continuum for abstention purposes is corroborated by the rule that an

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[22] This conclusion was anticipated in *Metropolitan Life v. Board of Directors*, 572 F.Supp. 460, 468 (W.D.Wis.1983).

adequate opportunity to raise constitutional challenges to an administrative proceeding (the third *Middlesex County* factor) will be found to exist even though that opportunity first became available upon review at the state court level. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. at 436, 102 S.Ct. at 2523.

> In any event, it is sufficient under *Middlesex, supra*, 457 U.S. at 436, 102 S.Ct. at 2523, that constitutional claims may be raised in state court judicial review of the administrative proceeding.

Ohio Civ. Rights Com'n v. Dayton Christian Schools, 106 S.Ct. at 2724; *New Orleans Public Service v. City of New Orleans*, 798 F.2d 858, 864 (5th Cir.1986), *cert. denied*, 481 U.S. 1023, 107 S.Ct. 1910, 95 L.Ed.2d 515 (1987); *Fore Way Exp. Inc. v. Wis. Dept. of Industry*, 660 F.Supp. 310, 312-313 (E.D.Wis.1987).

Alleghany places great reliance, in this regard, upon the Fifth Circuit's decision in *Thomas v. Texas State Bd. of Medical Examiners*, 807 F.2d 453 (5th Cir.1987). There the Medical Board had revoked plaintiff's license after a hearing. He initiated a review in the state court, but later dismissed it. He then brought an action under 42 U.S.C. § 1983 in federal court against the Board and the individual members seeking reinstatement of his license, declaratory relief and damages. he alleged a continuing vendetta against him, procedural due process claims, and various constitutional violations including the unconstitutionality of certain state statutes. The district court abstained, noting plaintiff's failure to pursue his state court remedies. The court of appeals reversed, stating:

> Because no state action was pending and exhaustion of state remedies is not required as a prerequisite to § 1983 cases, abstention under the principles of *Younger v. Harris*, [footnote omitted] as extended, was not appropriate. We therefore, reverse and remand.

Thomas, 807 F.2d at 454.

While *Thomas* does support Alleghany's position in some respects, I do not find it persuasive.[23] To the extent that it is based on the notion that the *Younger* standards may be avoided by simply dismissing the appeal or allowing the appeal time to expire, or that separate exhaustion requirements exist for state court adjudications and administrative adjudications, I believe it is contrary to the authorities discussed above and in *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 528 (*supra*, pp. 1527-28).

To the extent *Thomas* is based on the view that exhaustion of state remedies for *Younger* purposes is not required in cases under 42 U.S.C. § 1983, it appears to be

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[23] The case is distinguishable on a number of grounds: (1) *Younger* abstention does not apply to actions for damages under 42 U.S.C. § 1983, *Deakins v. Monaghan*, 484 U.S. 193, 108 S.Ct. 523, 531-532, 98 L.Ed.2d 529 (White, J. concurring) (1988), and it is unlikely that the damage claims would have been included in the state review proceedings; (2) relief was sought from the individual board members who would not have been parties to the review proceedings in that capacity; (3) there are no findings of fact from which the adjudicative nature of the administrative proceeding can be determined; and (4) the charge of a personal vendetta by the board is not unlike the charge of bias in *Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 1697, 36 L.Ed.2d 488 (1973), which was found to render *Younger* abstention inappropriate.

contrary to other authorities. *Huffman, Ohio Civil Rights Commission,* and *Pennzoil* all involved § 1983 claims, and in each case *Younger* abstention was invoked and the plaintiffs were left to pursue their constitutional remedies in the state forums.[24] The *Younger* exhaustion requirement is a function "of the deference to be accorded state proceedings *which have already been initiated* and which afford a competent tribunal for the resolution of federal issues." *Huffman,* 420 U.S. at 609-610, n. 21, 95 S.Ct. at 1210-11, n. 21 (emphasis added). *Monroe v. Pape,* 365 U.S. 167 (1961) and *Patsy v. Florida Board of Regents,* 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), on the other hand, stand for the quite different proposition that one need not, as a general requirement, initiate state court proceedings or pursue state administrative remedies as a precondition to beginning a § 1983 action in the federal court. See *Jordi v. Sauk Prairie School Bd.,* 651 F.Supp. 1566, 1578 (W.D.Wis.1987); *Metropolitan Life v. Board of Directors,* 572 F.Supp. 460, 473 (W.D.Wis.1983); dissenting opinion of Justice Rehnquist in *City of Columbus v. Leonard,* 443 U.S. 905, 907-910, 99 S.Ct. 3097, 3098-3100, 61 L.Ed.2d 872 (1979). For all the above reasons, I decline to follow the holding in *Thomas.*

Alleghany also contends that it cannot be required to seek state court review of the Commissioner's administrative order on the authority of a footnote in Huffman, 420 U.S.

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[24] This evoked a strong dissent by Justice Brennan in *Huffman,* 420 U.S. at 613-618, 95 S.Ct. at 1212-15, – a view which he again expressed in his concurring opinion in *Pennzoil,* 107 S.Ct. at 1530.

at 610, n. 21, 95 S.Ct. at 1211, n. 21, which reads, in pertinent part:

> Our exhaustion requirement is likewise not inconsistent with such cases as *City Bank Farmers' Trust Co. v. Schnader*, 291 U.S. 24 [54 S.Ct. 259, 78 L.Ed. 628] (1934), and *Bacon v. Rutland R. Co.*, 232 U.S. 134 [34 S.Ct. 283, 58 L.Ed. 538] (1914), which expressed the doctrine that a federal equity plaintiff challenging state administrative action need not have exhausted his state judicial remedies. Those cases did not deal with situations in which the state judicial process had been initiated.

A careful reading of the quoted language in its context reveals that the court is merely preserving the distinction between the separate exhaustion doctrine represented by the *Bacon* and *City Bank* cases and the exhaustion requirement in *Younger* cases. The same point had been made earlier in *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973).

> Normally when a State has instituted administrative proceedings against an individual who then seeks an injunction in federal court, the exhaustion doctrine would require the court to delay action until the administrative phase of the state proceedings is terminated, at least where coverage or liability is contested and administrative expertise, discretion, or factfinding is involved.[13]

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[13] This exhaustion requirement does not apply generally to state "judicial," as opposed to "administrative," remedies. See *Bacon v. Rutland R. Co.*, 232 U.S. 134 [34 S.Ct. 283, 58 L.Ed. 538] (1914); *City Bank Farmers Trust Co. v. Schnader*, 291 U.S. 24 [54 S.Ct. 259, 78 L.Ed. 628] (1934). *The doctrine of exhaustion of*

> *administrative remedies should, however, be kept distinct from other equitable doctrines such as those exemplified in Younger v. Harris, 401 U.S. 37 [91 S.Ct. 746, 27 L.Ed.2d 669] (1971), and Railroad Comm'n v. Pullman Co., 312 U.S. 496 [61 S.Ct. 643, 85 L.Ed. 971] (1941), which do require a federal court to defer in appropriate circumstances to state judicial proceedings.* [emphasis added]

Id. 411 U.S. at 574, 93 S.Ct. at 1695. Subsequent to the decisions in *Gibson* and *Huffman*, the Supreme Court, as discussed above, extended the *Younger* doctrine to state administrative proceedings, and the references in the quoted portions of the *Gibson* and *Huffman* footnotes to "state *judicial* proceedings" and "state *judicial* process" must now be read more broadly to include all state adjudicatory proceedings which satisfy the other requirements of *Younger*.[25] This conclusion also finds support in the Seventh Circuit's recent observation that court proceedings and administrative proceedings are on equal footing for purposes of *Younger* abstention. *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d at 528 (*supra*, pp. 1527-28).

The burden of proof was on Alleghany to show that it was unable to present its constitutional claims in related state court proceedings, *Pennzoil*, 107 S.Ct. at 1528; *Horn v. City of Chicago*, 860 F.2d 700, 702, n. 5 (7th Cir.1988) and it makes no pretense of meeting that burden. It must therefore be assumed that the state procedures would have provided an adequate remedy. *Id.*

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[25] Neither the *Middlesex County* case nor the *Ohio Civil Rights Commission* case (written by Justice Rehnquist) refers to the quoted portion of the *Huffman* footnote – an unlikely omission if the court intended to maintain a separate rule on exhaustion for administrative proceedings.

Finally, Alleghany suggests that since the time for state court review has expired, defendant's motion would deprive it of a remedy in any court if the motion to dismiss were granted. (Br. p. 4) But that is only the natural consequence of Alleghany's decision not to proceed. The same argument has been advanced and rejected without sympathy in other cases.

> While appellee had the option to appeal in state courts at the time it filed this action, we do not know for certain whether such remedy remained available at the time the District Court issued its permanent injunction, or whether it remains available now. *In any event, appellee may not avoid the standards of Younger by simply failing to comply with the procedures of perfecting its appeal* within the Ohio judicial system. [emphasis added]

Huffman, 420 U.S. at 611, n. 22, 95 S.Ct. at 1211, n. 22. *Pennzoil*, 107 S.Ct. at 1529, n. 16; *Horn*, 860 F.2d at 702, n. 5 ("That relief may no longer be available to plaintiffs in the state courts would not absolve them of a failure to assert state remedies in a timely manner.")

I conclude that the Commissioner's hearing was (1) of a judicial nature, (2) was a part of an ongoing judicial proceeding which afforded full opportunity for the presentation of plaintiff's knowingly failed to pursue its state remedies in a timely manner. Thus, the first and third of the *Middlesex County* tests have been met.

The remaining *Middlesex* factor is whether the state proceedings involve important state interests. This factor is, of course, a most critical one in the *Younger* analysis. It is evident from the many cases in which *Younger* abstention has been applied that the interests recognized are

extremely wide-ranging, and, as *Pennzoil* establishes, the state itself need not be a party for the doctrine to apply.[26] Contrary to the implication of plaintiff's argument, the recognition of, and deference to, the state's adjudication of those interests does not diminish or denigrate in any way the importance of the federal interests which the federal plaintiff seeks to vindicate.[27] As Justice Black wrote:

> What the concept [of federalism] does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not

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[26] *See e.g., Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) (civil nuisances); *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977) (welfare fraud); *Moore v. Sims*, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979) (child custody); *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982) (bar discipline); *Ohio Civil Rights Comm. v. Dayton Christian Schools*, 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986) (employment discrimination); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) (judicial procedures); *World Famous Drinking Emporium v. City of Tempe*, 820 F.2d 1079 (9th Cir. 1987) (zoning); *New Orleans Public Service, Inc. v. City of New Orleans*, 798 F.2d 858, *cert. denied* 481 U.S. 1023, 107 S.Ct. 1910, 95 L.Ed.2d 515 (1987) (utility rate requests). See, also, cases collected in Wright, Miller & Cooper, *supra*, § 4254 at n. 44 (parking fines, civil contempt, surgical procedures, physician discipline, kosher meat sales, and truancy).

[27] If the rule were otherwise, it would be necessary to resolve the substantive federal claims before deciding whether to return them to the state for resolution.

> unduly interfere with the legitimate activities of the States.

Younger, 401 U.S. at 44, 91 S.Ct. at 750. The premise is not that the federal interests will go unprotected, but rather that the state adjudicatory systems are equally competent to protect those interests (and will do so faithfully) and better suited to construe and apply state laws to effectuate state policies. See *Pennzoil*, 107 S.Ct. at 1529; *Huffman*, 420 U.S. at 602, 611, 95 S.Ct. at 1207, 1211.

Justice Powell pointed out in *Pennzoil*, that abstention in these circumstances has the further advantage of "avoid[ing] unwarranted determination of federal constitutional questions," and especially those based upon nonbinding federal interpretations of state statutes. *Pennzoil*, 107 S.Ct. at 1526. That, of course, touches the concern of the *Pullman* abstention doctrine, but the Court noted that the same considerations are relevant to *Younger* abstention. *Pennzoil*, 107 S.Ct. at 1526, n. 9.[28] This factor deserves consideration in the instant case, as it does not appear that the Wisconsin appellate courts have ever had occasion to construe the legislation in issue. (Defendant

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[28] *Pullman* abstention (*Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941)) has been defined as applying "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Colorado River Water Cons. Dist.*, 424 U.S. at 814, 96 S.Ct. at 1244, quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959) Unlike *Younger* abstention, *Pullman* abstention does not depend on the existence of related state proceedings and the federal court retains jurisdiction. *Pennzoil* 107 S.Ct. at 1526, n. 9; *Moses v. Kenosha County*, 826 F.2d 708, 709-710 (7th Cir. 1987).

represents that this is the first contested acquisition under the Act. (Rep.Br. p. 18, Dkt. #20)) As in *Pennzoil*, Alleghany's failure to present its claims to the Wisconsin courts has made it impossible to know whether, or to what extent, a conflict between state and federal law actually exists. Thus, as in *Pennzoil*, *Younger* abstention

> "offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests." *Moore v. Sims* [442 U.S. 415, 429-430, 99 S.Ct. 2371, 2380-81, 60 L.Ed.2d 994 (1979)].

Pennzoil, 107 S.Ct. at 1526-1527.

The state interest implicated by these proceedings is, of course, the regulation of the insurance industry. As noted earlier, Congress has specifically yielded the regulation of "the business of insurance and every person engaged therein" to the individual states. 15 U.S.C. § 1011 and 1012. See *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 429, 66 S.Ct. 1142, 1154, 90 L.Ed. 1342 (1946). In Wis.Stats. § 600.01 *et seq.* Wisconsin has undertaken that regulatory burden, and has invested in the defendant Commissioner the responsibility to carry it out. Wis.Stats. § 601.41. In furtherance of that responsibility, the Commissioner has also adopted extensive regulations. See 10 Wis.Adm.Code, Rules of Commissioner of Insurance.

That the subject of insurance and its regulation is a matter vital state interest can hardly be disputed. Indeed, that interest has been recognized in the abstention context on numerous occasions. *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 703 (10th Cir. 1988); *Levy v. Lewis*, 635 F.2d 960, 964 (2d Cir. 1980); *Metropolitan Life Ins. v. Board of*

Directors, 572 F.Supp. 460, 468-469, 473 (W.D.Wis. 1983). See also, *Matter of Cash Currency Exchange, Inc.*, 762 F.2d 542, 556 (7th Cir. 1985), *cert. denied*, 474 U.S. 904, 106 S.Ct. 233, 88 L.Ed.2d 232 (1985).

I also subscribe to the view expressed by Judge Urbom in the Nebraska litigation that the state proceedings involving the approval of transfers of control engage important state concerns.

> Nebraska obviously has an interest in the status of competition in insurance in Nebraska, the financial condition of anyone acquiring an insurance company incorporated in Nebraska, the plans and proposals for operation of the corporation, the competence of those who would be responsible for the operation of the Nebraska corporation, and the interests in general of policyholders of the Nebraska corporation. Those are important state interests.

Alleghany Corp. v. McCartney, No. CV-88-L-235, 1988 WL 156189 (D.Neb. Oct. 18, 1988) slip op. at 4 (Dkt. #47)[29]

Without intending to express a view as to the merits of Alleghany's constitutional claims (or the related issue

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[29] Judge Urbom granted the motion to dismiss in *McCarthy* on *Younger* grounds. The motion was denied in the North Dakota case both as to *Younger* and *Burford*. *Alleghany Corp. v. Pomeroy*, 698 F.Supp. 809 (D.N.D. 1988) (Dkt. #35). The reasons advanced in Judge Conmy's opinion are all considered in this Recommendation and will not be addressed separately. There was one major point of distinction, however. Substantial reliance was placed on the fact that constitutional challenges *could not* be raised on judicial review of the Commissioner's decision under the North Dakota statutes. Thus, the third *Middlesex* factor was not present. At 812-13.

of whether the subject legislation constitutes the regulation of "the business of insurance" for purposes of the McCarran-Ferguson Act), the factors the Commissioner is required to take into account in ruling upon a request to acquire control shares under Wis.Stats. § 611.72 essentially parallel the legislation or regulations with respect to the formation or operation of domestic companies, or the admission of non-domestic insurers.[30] The authority of the state to determine who shall have a license to write insurance in the state seems fundamental to this regulatory power. See Wis.Stats. §§ 610.01, 611.02, 618.01, .11. It is not surprising, then, that the subsidiary's eligibility for the issuance of a license after the transfer of control is the first factor to be considered by the Commissioner under § 611.72(3). Closely related to that factor is that pertaining to the competence and integrity of the persons who will be in control after the transfer (§ 611.72(3)(e)). Insurance companies receive large sums of money from the public in exchange for the companies' promise to fulfill the insurance contract when the risk insured against occurs. Most of the funds a company holds are earmarked for the discharge of those obligations to the policyholders.[31] It seems elementary that the regulatory authorities will wish to assure themselves that the stewards of those funds are not only trustworthy but are also informed and prudent managers. Thus, the Insurance Code has long required background information with regard to any

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[30] See *e.g.* Wis.Stats. §§ 610.001-.21; 611.10, .13, .19, .20, .54; 618.11, .12, .21; s. INS 12.01(11)(15) Wis.Adm.Code.

[31] Or on behalf of the policyholders, in the case of liability insurance, to discharge their obligations to injured third parties.

changes of principal management personnel and permitted the Commissioner to remove anyone deemed unsuitable from a position of influence. Wis.Stats. § 611.54(1), (3).

Two other, closely-related, factors bear o· what may be the Commissioners' most important responsibility – to see to the financial solvency of insurance companies under his jurisdiction. Whether a company writing insurance in Wisconsin is incorporated here or elsewhere, its insolvency has the same effect on the policyholders within the state. Thus, the statute requires the Commissioner also to consider the acquiring persons' plans for consolidation, liquidation or other material changes in business or corporate structure or management of the Wisconsin subsidiary or the parent company, as consistent with the Commissioner's obligation to see to the protection of the policyholders as well as the interest of the public in the integrity of its financial institutions. (Wis.Stat. § 611.72(3)(d)) The Commissioner's consideration, under subsection (3)(c), of the financial condition of the acquiring party, and the attendant risk of the impairment of the financial stability of the parent or its domestic subsidiary, appear also directly to engage the state's legitimate regulatory concern. It is, I think, common knowledge that the assets of insurance companies are, in the main, highly liquid – a condition which would make their assets vulnerable if an acquiring party were unable to make ends meet or wanted to use the insurance company assets for non-insurance purposes. This concern is reflected in other legislation regulating insurance holding companies and intercorporate transactions among

affiliates "that may affect the solidity of insurers authorized to do business in this state or otherwise be detrimental to protected interests." Wis.Stat. §§ 617.01(2), .21-.23.

Finally, the statute (§ 611.72(3)(b)) permits the Commissioner to consider the competitive effect of the acquisition. In this he again exercises an authority which has also been conferred upon him with respect to other insurance matters. Wis.Stats. § 601.01(3).

I see no need to prolong this discussion unnecessarily. While Alleghany denies the existence of any important state interest or questions of state policy, it makes no attempt to demonstrate that the factors to be taken into account by the Commissioner are unrelated to legitimate regulatory concerns. The express concern of this legislation for the protection of the solvency of domestic insurance companies and foreign insurance companies licensed to write insurance in Wisconsin and for their Wisconsin policyholders is at least of equal importance as the state's interests in the liquidation of insurance companies which led the courts to abstain in *Grimes*, 857 F.2d at 703; *Levy*, 635 F.2d at 964 and *Metropolitan Life*, 572 F.Supp. at 469, 473.

All of the elements requisite to *Younger* abstention as spelled out in *Middlesex County* are present here, and abstention is therefore mandated. *Pennzoil*, 107 S.Ct. at 1526. To hold otherwise would render the doctrine a virtual nullity, and would also require this court to construe important state regulation which has never been subjected to appellate scrutiny by the Wisconsin courts.

This not only invites the expenditure of substantial federal judicial energy in the production of what would likely be a meaningless, advisory opinion (*Pennzoil*, 107 S.Ct. at 1526), but would also repudiate the central thesis of the *Younger* doctrine by supplanting the prerogative of the state to construe, in ongoing proceedings, its own legislation in such a way as to reconcile its important policies with the federal constitution and statutes.

Alleghany has offered a number of other arguments in opposition to the motion. I have considered these contentions and find them to be without merit. A summary discussion of the principal points follows.

Alleghany argues that *Younger* does not apply (1) because the state did not initiate the administrative proceeding, (2) it was not a state enforcement proceeding, and (3) Alleghany has not violated the state law. (Br. pp. 14-24) It will be observed at the outset that the three-fold *Middlesex County* test contains no reference to any of the points. All that it requires (and its authority stands undiminished) is an ongoing state judicial proceeding implicating important state interests which afford an adequate opportunity to raise constitutional questions. *Id.*, 457 U.S. at 432, 102 S.Ct. at 2521. This attempt to promote factual characteristics and descriptive language from other cases to the level of predicate elements would simply add more "pigeonholes" to abstention theory and "trivialize the principles of comity and federalism" which underlie the abstention doctrine. *Middlesex County*, 457 U.S. at 437, 102 S.Ct. at 2524. The Supreme Court has developed this doctrine, and Alleghany has pointed to no language in any of its cases which would restrict its application to proceedings initiated by a particular party

or for particular purpose. Important state interests can be "implicated" in countless ways, in countless proceedings by all manner of litigants. To impose such artificial conditions and restrictions upon the applicability of the rule would nullify its stated purpose of rendering "proper respect" to the states and their adjudicatory processes. *Younger v. Harris*, 401 U.S. at 44, 91 S.Ct. at 750. See also, *New Orleans Public Service*, 798 F.2d at 863, n. 2.[32] Whatever surface plausibility these contentions might otherwise have had, it is laid to rest by *Pennzoil*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987), a case in which none of these factors were present. The state was not even a party, let alone the *initiator of enforcement* proceedings, and no *violation* of state law was claimed to have occurred. *Pennzoil* contradicts every point of Alleghany's thesis and no further discussion is required. See *Metropolitan Hospital v. Thornburgh*, 667 F.Supp. 208, 211 (E.D. Pa. 1987).

Alleghany next contends that abstention under the *Younger* doctrine is inappropriate because Alleghany seeks only prospective relief. It asserts that it does not seek to enjoin or annul defendant's order, but rather that it seeks only declaration that the legislation is invalid and

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[32] The instant case reveals the flaw in plaintiff's argument. The state's interest in insurance regulation is implicate equally whether presented in the context of a proceeding instituted by the Commissioner for a violation of the legislation or in the context of a hearing on a petition for advance approval. The disruption of federal intervention would also be felt equally in either case. It is difficult to credit as serious the suggestion that an important state interest can never be implicated in the absence of a showing of a "violation" of law.

injunctive relief to prevent the Commissioner from invoking or enforcing it in the future. (Cmplt. ¶¶50-51, I-III, Dkt. #1)[33]

Alleghany sought approval to buy the ST. PAUL stock, and lengthy hearings followed. The Commissioner issued an order denying the application and it is presumably that order which he would seek to enforce should Alleghany purchase more stock. See Wis.Stats. §§ 601.41(4), 601.64. As we have seen, plaintiff had every opportunity to challenge the order and the statute under which it was issued in those proceedings. Instead, it voluntarily filed this complaint before its appeal time had even run. It is simply sophistry to say that the relief here is somehow different from the remedy Alleghany would have had under the state procedures. No matter how artfully worded its complaint may be, the obvious and intended effect of the present lawsuit is to prevent the Commissioner from enforcing his order. It is difficult to think of a clearer example of the sort of abuse that *Younger* was intended to prevent. See *Huffman*, 420 U.S. at 608-09, 95 S.Ct. at 1210-11.[34]

Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) lends no support to Alleghany's position. There the federal plaintiff had been convicted three

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[33] The *Younger* rule applies to requests for declaratory relief as well as injunctions. *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971).

[34] Moreover, as Alleghany also challenges the constitutionality of the legislation as *applied* to it, some review of the proceedings before the Commissioner, and his decision, would appear unavoidable. (Compl. ¶¶ 31-35, 41 and 46.)

times in a five-week period for refusing to display the state's license plate motto which offended his religious principles and first amendment rights. He sought and obtained federal declaratory and injunctive relief against future prosecutions for the offense. The state claimed the federal court erred in hearing the case as plaintiff had not exhausted his appellate remedies in the earlier prosecutions. *Id.* at 709-711, 97 S.Ct. at 1432-34. The Supreme Court upheld the decision, finding that "exceptional circumstances" were present to justify the interference. As previously noted (*supra* n. 17) the *Younger* decision itself provided for such an exception to the rule, and the *Wooley* court found it in the successive prosecutions to which the plaintiff had been, and continued to be, exposed. *Wooley*, 430 U.S. at 712, 97 S.Ct. at 1234.[35]

The instant case is readily distinguishable from *Wooley*. Alleghany has made no claim that exceptional circumstances exist, and it could hardly do so.

> The very nature "extraordinary circumstances," of course, makes it impossible to anticipate and define every situation that might create a sufficient threat of such great, immediate, and irreparable injury as to warrant intervention in state criminal proceedings. [footnote omitted] But whatever else is required, such circumstances must be "extraordinary" in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation.

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[35] The court noted, by way of distinction that the plaintiff had not asked to have the prior convictions annulled or expunged. (*Id.* at 711, 97 S.Ct. at 1434)

Kugler v. Helfant, 421 U.S. 117, 124-25, 95 S.Ct. 1524, 1530-31, 44 L.Ed.2d 15 (1975). Alleghany does not appear to face a threat of criminal prosecution at all, let alone a succession of them. At most it faces a risk of future civil enforcement proceedings if it should fail to obey the Commissioner's order. And since Alleghany is also apparently prevented from going forward with its purchases because of regulatory actions in other states, it can hardly claim a pressing need for immediate relief in this court.

Alleghany also argues that abstention is improper because it has alleged that Wisconsin exceeded its powers and authority in its enactment of the subject legislation and in its application of it to Alleghany. For this proposition it cites cases from a number of circuits which hold that abstention should not be invoked in preemption cases. See, *e.g.*, *Southwestern Bell Telephone Co. v. Arkansas Public Service Comm*, 824 F.2d 672, 673 (8th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1293, 99 L.Ed.2d 503 (1988) (citing cases). There is a contrary view represented by *New Orleans Public Service v. City of New Orleans*, 798 F.2d 858, 860-864 (5th Cir. 1986), *cert. denied*, 481 U.S. 1023, 107 S.Ct. 1910, 95 L.Ed.2d 515 (1987) and *Aluminum Co. v. Utilities Comm. of State of N.C.*, 713 F.2d 1024, 1028-30 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052, 104 S.Ct. 1326, 79 L.Ed.2d 722 (1984).[36] The Seventh Circuit has not visited

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[36] Without having made a study of it, it appears that the bulk of the cases on this point involve the regulation of electric (and other) utilities which are subject to regulation by both the state and federal authorities. See *New Orleans Public Service*, 798 F.2d at 860 and the discussion at 862, n. 1.

the question nor has the Supreme Court.[37] However a statement by the Supreme Court, in a related context, supports the view that the mere fact of a preemption (or Commerce Clause) claim ought not foreclose the operation of the *Younger* rule. In *Ohio Civil Rights Commission* the court said:

> we have repeatedly rejected the argument that a constitutional attack on state procedures themselves "automatically vitiates the adequacy of those procedures for the purpose of the *Younger-Huffman* line of cases." [citation omitted]

106. S.Ct. at 2724. I can think of no sound reason why the naked assertion of a preemption claim should automatically override the considerations of comity underlying *Younger*.

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[37] But see *People of State of Illinois v. Kerr-McGee Chem. Corp.*, 677 F.2d 571, 577-578 (7th Cir. 1982), which rejects, in another context, the underlying premise of Alleghany's argument:

> We do not agree, however, that a defendant can have a state law claim removed to federal court merely by uttering the word preemption. No such result has been authorized by statute nor has it been sanctioned by the Supreme Court.
>
> * * *
>
> [w]e reaffirm our decision in *Bailey* and join at least two other circuits and a number of district courts in holding that the issue of federal preemption is merely a defense to state law claims. [footnote omitted] We can see no reason for treating a defense of federal preemption differently than any other defense based on federal law, and a defense to a state law claim cannot be a ground for removal.

The reason for abstention here are even stronger than they were in *New Orleans Public Service*. The court acknowledged there that Congress had created a "bright line" dividing federal and state regulatory authority over electric rates, but abstained nevertheless, stating:

> Yet federal court intervention here may constitute a disruption of a *state* regulatory scheme, for *retail* rate making is clearly a field left to the jurisdiction of the states. [emphasis in original]

Id., 798 F.2d at 860. In the instant case, the singular authority of the state to regulate insurance requires no further discussion, and it is equally clear that federal intervention may disrupt the state's well established regulatory scheme for determining who may engage in the business of insurance in Wisconsin and under what conditions.

Alleghany's argument requires the court to assume that the Wisconsin Act has been preempted by the Williams Act, but it has offered nothing by way of argument or authority on this motion to support that assumption. To the contrary, *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 107 S.Ct. 1637, 1652, 95 L.Ed.2d 67 (1987) teaches that the Williams Act does not automatically foreclose states from adopting all legislation within the proper sphere of their historical authority just because the legislation may have a collateral (even deterrent) effect on attempts to take control of domestic corporations.

To reiterate, the purpose of the Williams Act is to protect investors in the context of transfers of corporate control. *CTS Corp.*, 107 S.Ct. at 1644. This is achieved through a market approach based upon full disclosure of

all material information and strict regulatory neutrality. *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1276-1278 (5th Cir. 1978) *rev'd on other grounds sub nom. Leroy v. Great Western United Corp.*, 443 U.S. 173, 99 S.Ct. 2710, 61 L.Ed.2d 464 (1979). The regulator must remain indifferent to the outcome of the contest or the relative merits of the contestants on their proposals.

The Wisconsin Act is not concerned about investors, but rather in preservation of the financial integrity of insurance corporations subject to Wisconsin's regulatory jurisdiction and the protection of the interests of Wisconsin policyholders. The Commissioner's responsibilities under the Act require him to make an evaluation of the suitability of the party seeking to take control, but he has no authority with regard to the fairness or reasonableness of any proposal to the shareholders of the target company.

The points of conflict in these regulatory schemes must be reconciled somewhere. The substantive claims of the parties are not before me on this motion, and it is not my intent to do more here than pose the apparent positions of the parties. It is agreed, I think, that the Williams Act does not profess to concern itself with the regulation of insurance (nor has it been suggested that it "specifically relates to the business of insurance" so as to preclude state regulation under the McCarran-Ferguson Act). (15 U.S.C. § 1012) However, if, as Alleghany urges, the Williams Act is to be read as barring the legislation in issue, a serious gap may be created in this area of insurance regulation. To me, this militates against taking the issue out of the state adjudicatory process, and it is for that reason that I consider the holding in *New Orleans*

Public Service to represent the better reasoned course. It is also the course recently adopted by Judge Gordon in an employment discrimination case in which the plaintiff, an interstate trucking company, contended that the provisions of the Wisconsin Fair Employment Act regarding handicapped persons had been preempted by a federal law which declared certain diabetics to be unqualified to drive motor vehicles. *Fore-Way Exp. Inc. v. Wis. Dept. of Industry*, 660 F.Supp. 310, 313 (E.D.Wis.1987). As here, that case also involved " 'a complex state regulatory scheme . . . which would be disrupted by federal court review' " and "a state court system possessing expertise which is fully capable of addressing [plaintiff's] complaints." *Id.* at 313 citing *New Orleans Public Service*, 798 F.2d at 862, n. 1.[38]

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[38] Judge Gordon also found that the resolution of the preemption claim would have involved the federal court in detailed factfinding about matters within the traditional purview of the state. I am somewhat perplexed by the Commissioner's statement that factfinding would not be required in this case. (Rep.Br. p. 15, Dkt. #20) The statement appears to be based more upon the perceived shortcomings of Alleghany's arguments than a considered evaluation of the questions that would ultimately have to be decided. I would note initially that the Commissioner's order is premised on the authority of the McCarran-Ferguson Act which, in turn invites inquiry as to whether or not the Wisconsin Act pertains to the business of insurance. How that proposition can be established or negated without evidence, expert or otherwise, regarding the actual operation of insurance companies and the nature, operation and effect of the insurance regulatory measures involved is not at all clear. This very case points up the fact that the same regulatory actions may be open to a range of inferences. Thus,

(Continued on following page)

For the foregoing reasons, I will recommend that the motion to dismiss be granted pursuant to *Younger v. Harris*.

II. *Burford Doctrine*

Defendant has also moved to dismiss under the abstention doctrine of *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). In *Jordi v. Sauk Prairie School Bd.*, 651 F.Supp. 1566, 1578 (W.D.Wis.1987), this court observed that

> *Burford* abstention "is appropriate only if federal review of a difficult question of state law would disrupt state efforts to establish a coherent policy respecting a matter whose importance transcends the result in the case under consideration." *Evans v. City of Chicago*, [689 F.2d 1286, 1295 (7th Cir.1982)] and *Metropolitan Life v. Board of Directors*, 572 F.Supp. 460, 473 (W.D.Wis. 1983).

In *Burford* a federal court challenge was mounted against the constitutionality of the procedure by which Texas regulated oil and gas production. The regulation of

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(Continued from previous page)

the legislation that Judge Urbom in Nebraska viewed as being in furtherance of an important state interest, *Alleghany Corp. v. McCartney*, No. CV-88-L-235, 1988 WL 156189 slip op. p. 4 (Dkt. #47) has been characterized by Judge Conmy in North Dakota as "purely economic protectionism of those currently in control of the insurance company." *Alleghany Corporation v. Pomeroy*, 700 F.Supp. 460, 467 (D.N.D.1988), slip op. at 16 (Dkt. #50) contrary to the parties' views, I suggest that extensive factfinding may well be required to resolve the issues presented by the complaint.

the oil and gas industry was a subject of great public importance, and required the maintenance of a uniform policy. The subject was very complicated and specialized knowledge was required for the administration of the system. The regulatory authority was vested in an administrative body with broad discretion, and its rulings were subject to a specialized judicial review. *Burford*, 319 U.S. at 319-327, 63 S.Ct. at 1100-04. Noting that "[d]elay, misunderstanding of local law and needless federal conflict with the state policy" had attended previous federal intervention in these matters, the Supreme Court held that the federal courts should decline to exercise their jurisdiction. *Id.* at 327, 333-334, 63 S.Ct. at 1104, 1107-08.

> The State provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commissioner's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal question is fully preserved here. *Cf. Matthews v. Rodgers*, 284 U.S. 521 [52 S.Ct. 217, 76 L.Ed. 447 (1932)]. Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand.

Id. 319 U.S. at 333-334, 63 S.Ct. at 1107-08. See *New Orleans Public Service*, 798 F.2d at 862.

No simple test has emerged for *Burford* abstention, *Metropolitan Life v. Board of Directors*, 572 F.Supp. 460, 472 (W.D.Wis. 1983), but a review of the relevant factors

noted in the authorities leads me to conclude that it is applicable here. *See e.g. Jordi*, 651 F.Supp. at 1578-1580. The regulation of insurance, like the regulation of oil and gas production, is an exceedingly complex subject and specialized knowledge is required. The regulatory authority is, by statute, centralized in the office of the Commissioner of Insurance. See generally Wis.Stats. §§ 601.01, .41, .415, .61-.64.[39] Of particular significance in the *Burford* context is the formal, federal policy of noninterference with the state regulation of insurance as expressed in the *McCarran-Ferguson Act*. *See Levy v. Lewis*, 635 F.2d 960, 963-64 (2d Cir.1980); *Matter of Cash Currency Exchange, Inc.*, 762 F.2d 542, 556 (7th Cir.), *cert. denied* 474 U.S. 904, 106 S.Ct. 233, 88 L.Ed.2d 232 (1985); *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 703-704 (10th Cir.1988) citing *Metropolitan Life v. Board of Directors*, 572 F.Supp. at 472-473.

This action by Alleghany is a direct attack on an insurance regulatory policy adopted by the legislature and enforced by the Commissioner. *Jordi*, 651 F.Supp. at 1579. This policy, as previously discussed, has as its purpose the regulation of transfers of control of domestic insurance companies or the holding companies which control them.[40] This is not the place to discuss either the

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[39] Unlike *Burford*, Wisconsin has not designated a particular trial court to review all of the Commissioner's determination, but the state law does require a reviewing court to grant due weight to the special competence and discretionary authority of administrative agencies. Wis.Stats. § 227.57(10). I do not consider the absence of this factor to be critical.

[40] See discussion, *supra* pp. 1533-35.

merits or constitutional validity of this policy. It is sufficient to note again that a relationship does exist between this specific policy and the general authority the Commissioner has and exercises over the licensing the supervision of insurance companies generally. What is even more important is that forty-seven other states have also identified this subject as one of regulatory concern and have adopted essentially the same legislation.

That this litigation would be disruptive of the state's efforts to maintain a consistent policy in this area requires little discussion. While this court unquestionably has the jurisdiction to rule on the constitutional challenges, it is not in a position to formulate state policy in this area no matter how valid and pressing the concerns of the Commissioner may be regarding the potential risks to the solvency of domestic insurance companies or the interests of Wisconsin policyholders. This court's statement in *Metropolitan Life* has direct application here and sums up the justification for *Burford* abstention in this case.

> [A] decision by this court of the state claims could impede efforts to implement the state policy expressed in Wis.Stats. § 646.01(2)(a) and the very exercise of federal jurisdiction will interrupt the state's efforts to effect its policy respecting the liquidation and rehabilitation of Wisconsin insurance companies and the concomitant protection of policyholders. Indeed, the potential for conflict in the results of federal and state court adjudication could bring to a halt the state's efforts in this respect. It is a matter of substantial state concern that the process of liquidating an insurance company be carried out in an orderly and efficient manner, so as to protect the interests of the company's

> owners, policyholders, and creditors, as well as the public.

Metropolitan Life v. Board of Directors, 572 F.Supp. at 473. The state's interest in policies designed to prevent financial impairment of insurance companies and to protect the ongoing interests of policyholders, must be seen as at least as great as its interest in the procedures for the liquidation of companies which have failed.

It will therefore be recommended that plaintiff's complaint be dismissed on *Burford* grounds as well. 17A Wright, Miller and Cooper, *Federal Practice and Procedure, Jurisdiction, 2d* (1988) § 4245 at 101-102.

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED, pursuant to 28 U.S.C. § 636(b)(1)(B), that defendant's motion to dismiss be GRANTED on each of the grounds stated.

ENTERED this 12th day of December, 1988.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ALLEGHANY CORPORATION, Plaintiff, v. JOHN J. DILLON, Commissioner of Indiana Department of Insurance, THE ST. PAUL COMPANIES, INC., and ST. PAUL INDEMNITY INSURANCE COMPANY, Defendants.	)	CAUSE NO. IP 88-561-C

ORDER FOR DISMISSAL WITHOUT PREJUDICE

Upon presentation and filing of the Stipulation of Dismissal Without Prejudice,

IT IS HEREBY ORDERED, that this action, and all claims asserted therein, be, and hereby is, dismissed as moot without prejudice and without costs or disbursements to any party.

Dated: JUL 18 1990, 1990.

/s/ William E. Steckler
Judge, United States
District Court

Copies to: [all counsel]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ALLEGHANY CORPORATION	)	
	)	
v.	)	
	)	
HARRY E. EAKIN, Commissioner of Indiana Department of Insurance,	)	IP 88-561-C
THE ST. PAUL COMPANIES, INC., and ST. PAUL INDEMNITY INSURANCE COMPANY	)	

ORDER OF MARCH 20th, 1989

This matter is before the Court upon the motions of all defendants to amend this Court's January 30, 1989 order to allow an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Defendants, Eakin, St. Paul Companies, Inc., and St. Paul Indemnity Insurance Company, wish to appeal the Court's order denying defendants' motions to dismiss the complaint. Plaintiff opposes the motion. Having considered the motion, the Court finds that the motion to amend the order should be granted.

A district court may certify an order for immediate appeal if the judge is of the opinion that the order involves a controlling issue of law which is subject to a difference of opinion and "that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . . " 28 U.S.C. § 1292(b). Here the Court finds that its order of January 30, 1989, meets this standard. Accordingly, the Court hereby GRANTS the motions to amend the order.

The order of January 30, 1989 is amended to include the following concluding paragraphs:

> It is well recognized that '[a]bstention from the exercise of federal jurisdiction is the exception, not the rule.' *Colorado River*, 424 U.S. at 813. When, as in this case, (1) there is no pending administrative or judicial proceedings; (2) the plaintiff has violalted no law and the state has initiated no enforcement proceedings; (3) no state law issues must be decided within a complex regulatory syustem; and (4) the state has not designated a specific court for review, abstention is not called for and would unnecessarily contract federal jurisdiction.
>
> Accordingly, for all the foregoing reasons, the Court hereby DENIES defendants' motion to dismiss plaintiff's complaint.
>
> In the Court's opinion, this decision involves a controlling question of law as to which there is substantial ground for difference of opinion. An immediate appeal from this order denying defendants' motion to dismiss may materially advance the ultimate termination of the litigation.

Pursuant to Fed. R. Civ. P. 60(a), the Court also amends the order at page four, line thirteen, as follows:

> Replace "April" with "May."

IT IS ORDERED that the Court's order of January 30, 1989, be so amended.

IT IS FURTHER ORDERED that these proceedings are stayed pending further action of the Court.

Dated this 20th day of March, 1989.

/s/ William E. Steckler
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ALLEGHANY CORPORATION	)	
	)	
v.	)	
	)	
HARRY E. EAKIN, Commissioner of Indiana Department of Insurance,	)	IP 88-561-C
	)	
and	)	
THE ST. PAUL COMPANIES, INC., and ST. PAUL INDEMNITY INSURANCE COMPANY	)	

ORDER OF January 30th, 1989

This matter is before the Court on defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1). Defendants Harry E. Eakin, Commissioner of Indiana Department of Insurance ("Commissioner"), the St. Paul Companies, Inc. ("St. Paul") and the St. Paul Indemnity Insurance Company ("St. Paul Indemnity") seek dismissal under either *Younger* or *Burford* abstention. *Younger v. Harris*, 401 U.S. 37 (1971); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

Plaintiff, Alleghany Corporation, seeks declaratory judgment and injunctive relief to determine the constitutionality of certain provisions of the Indiana Insurance Holding Company Act ("Act"), Ind. Code §§ 27-1-23-1, *et seq.*

Defendants have also moved for oral argument on the motion to dismiss. The Court finds, however, that the issues have been so fully briefed that oral argument will

not be necessary. Accordingly, the request for oral argument is denied.

Having considered the motions, briefs, testimony, and exhibits, the Court finds that defendants' motion to dismiss should be denied.

I. Facts.

Alleghany is a Delaware corporation with its headquarters in New York. Its common stock is listed and traded on the New York Stock Exchange. Since its formation in the 1920's as a railroad holding company, it has bought and sold substantial minority positions in several companies. Alleghany is currently engaged in the sale and underwriting of title insurance and in the property and casualty insurance business.

St. Paul Companies, Inc. is incorporated in Minnesota with its headquarters in St. Paul, Minnesota. St. Paul is an insurance holding company and wholly owns St. Paul Fire and Marine Insurance Company, a Minnesota corporation, which in turn wholly owns St. Paul Indemnity, an Indiana stock insurance corporation. St. Paul Indemnity is a major provider of medical professional liability insurance for hospitals, physicians and surgeons in Indiana.

Ind. Code § 27-1-23-1, *et seq.*, authorizes the Indiana Insurance Commissioner to approve or disapprove the acquisition of more than 10% of the outstanding voting securities of an insurer incorporated in Indiana. The statute provides for state court review of the Commissioner's decision. Ind. Code § 27-1-23-12(a).

Alleghany is attempting to acquire more than 10% of St. Paul Indemnity as a part of its efforts to gain control of St. Paul Companies, Inc. The endeavor is subject to regulation in Indiana pursuant to Ind. Code. §§ 27-1-23-1, *et seq.*, and in eight other states under similar statutes.

On November 19, 1987, Alleghany filed an Amended Form A pursuant to Section 60D.02 of the Minnesota Insurance Holding Company Act proposing to acquire up to 20% of the stock of St. Paul Companies, Inc. On January 11, 1988, a Deputy Commissioner of the Minnesota Department of Commerce, gave Alleghany approval to acquire up to and including 20% of the common stock of the St. Paul Companies, Inc. The decision of the Deputy Commissioner is currently under review in the Minnesota courts.

The Indiana Commissioner denied Alleghany's application on March 25, 1988. Applications were also disapproved in North Dakota (March 29, 1988), Wisconsin (April 7, 1988), and Nebraska (April 11, 1988. The Texas Department of Insurance issued a recommendation that the application be denied. California approved a similar application on March 14, 1988.

Alleghany did not initiate a proceeding in the Indiana state courts to overturn the Commissioner's conclusion that Alleghany had not satisfied the criteria necessary for his approval under the Indiana Act pursuant to Ind. Code § 27-1-23-12(a). Rather, Alleghany filed this action in federal court on April 12, 1988, to challenge on federal constitutional grounds the requirement that an insurance holding company must receive the insurance commissioner's approval before purchasing

stock of an Indiana insurance company. Alleghany alleges that certain provisions of the Indiana Act violate the Commerce, Supremacy, and Due Process Clauses of the United States Constitution and 42 U.S.C. § 1983, because they permit the Commissioner to bar interstate securities transactions in the stock of a non-Indiana corporation between purchasers and sellers who reside in states other than Indiana. Alleghany also filed constitutional challenges against the analogous statutes in Nebraska, Wisconsin, and North Dakota.

II. Abstention

A. *Younger* abstention.

The Supreme Court held in *Younger v. Harris, supra,* that it was inappropriate for a federal court to enjoin a pending state criminal prosecution. The Court's holding was based on the premise that equity should not act when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied a federal forum. The concepts of federalism and comity have been extended to noncriminal state administrative proceedings when those proceedings are judicial in nature and still pending (*Ohio Civil Rights Commission v. Dayton Christian Schools,* 477 U.S. 619 (1986) and *Middlesex County Ethics Committee v. Garden State Bar Ass'n,* 457 U.S. 423 (1982)) and, in 1987, to litigation between purely private litigants. *Pennzoil Co. v. Texaco, Inc.,* 107 S.Ct. 1519 (1987)

1. *Younger* applies to pending judicial proceedings and no proceedings are pending on Alleghany's application.

Younger requires that there be a pending state proceeding; that the federal plaintiff seek to enjoin that

proceeding; and that the state proceeding be one in which the state vindicates an important interest (a proceeding which is criminal, quasi-criminal or in the nature of a civil enforcement proceeding brought after a violation of state law or policy). The state proceeding must be "judicial in nature" and must provide the federal plaintiff a "full and fair opportunity" to raise his federal claims.

In *Dayton*, the Supreme Court ordered abstention for a state administrative proceeding which was part of an ongoing judicial proceeding. 477 U.S. at 628 n. 2. A teacher at Dayton Christian Schools filed a complaint with the Ohio Civil Rights Commission alleging sexual discrimination. *Id.* at 623. After a preliminary investigation, the Commission found probable cause to believe that Dayton had discriminated against the teacher based on sex. *Id.* at 624. When Dayton failed to correct the situation, the Commission initiated administrative proceedings against Dayton. While the administrative proceedings were still pending, Dayton filed a 42 U.S.C. § 1983 action in federal court seeking to enjoin the Ohio Civil Rights Commission from proceeding with the administrative hearings. *Id.* In holding that the District Court should have abstained, the *Dayton* Court emphasized that concern for comity and federalism applies to pending administrative proceedings (of a judicial nature) as well as to pending proceedings in state court. *Id.* at 627.

Thus, when important state interests are implicated in a proceeding and intervention in that *ongoing* proceeding would create a needless intrusion of the federal court

into the state proceeding, the federal court should abstain. *See Moore v. Sims*, 442 U.S. 415, 423 (1979); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604-605 (1975).

In the case before the court, however, plaintiffs have received a final determination on their application to acquire control of St. Paul Indemnity. This determination cannot be characterized as "ongoing" or "pending."

True, Alleghany could have availed itself of judicial review of the denial of its application in the Indiana state courts pursuant to Ind. Code § 27-1-12-12(a). Alleghany chose not to challenge its individual decision but instead attacked the validity of the statute in its entirety. Review of the individual decision or the constitutionality of the procedures as applied to Alleghany would have been the exclusive domain of the state court as identified in the statute. *See Thompson v. Medical Licensing Board*, 389 N.E.2d 43, 47 (1979); *State ex rel. Paynter v. Marion County Superior Court Room No. 5*, 344 N.E.2d 846 (Ind. 1976); *Indiana Bell Telephone Co. v. Friedland*, 373 N.E.2d 344 (Ind. App. 1978).

However, Indiana law indicates that when a plaintiff attacks the validity of the ordinance in its entirety, it is unnecessary for the plaintiff to follow the statutory appeal procedure. *See Indiana Waste v. Board of Commissioners of County of Howard*, 389 N.E.2d 52, 56 (Ind. App. 1979); *see also State ex rel. City of South Bend v. St. Joseph Superior Court*, 148 N.E.2d 558 (1957); *State ex rel. City of South Bend v. Marckle*, 18 N.E.2d 764 (1939).

In this case, no state judicial proceedings are pending and the concluded administrative proceedings before the

insurance commissioner did not deal with the constitutional issues raised here. Indeed, constitutional issues are not within the domain of administrative proceedings. *Wilson v. Board of Indiana Employment Security Division*, 385 N.E.2d 438, 441 (1979); *see also Mogilner v. Metropolitan Plan Commission*, 140 N.E.2d 220, 229 (1957).

To force Alleghany to litigate its constitutional challenge to the Indiana statute exclusively in state court would result in the unnecessary contraction of federal jurisdiction deplored by the Court of Appeals for the Seventh Circuit in *People of State of Illinois v. General Elec. Co.*, 683 F.2d 206, 212 (1982), *cert. denied*, 461 U.S. 913 (1983). Here, as in that case,

> No state suit had even been filed when the federal suit was filed, let alone had proceeded to the point where the exercise of federal jurisdiction would have interrupted an active state court litigation. *Id.*

The Seventh Circuit ruled that in such a situation abstention was inappropriate.

Recently the Fifth Circuit ruled that abstention was not required when neither state administrative nor state judicial proceedings are pending.

> A person who contends that his constitutional rights have been violated by a state administrative proceeding is not required to resort to an appeal to state courts before seeking relief in a federal forum. At the time this suit was filed, no state action was pending. . . . When no state proceedings are pending, a federal action does not interfere with or insult state processes and 'the policies on which the *Younger* doctrine is premised have little force. . . .

Thomas v. Texas State Board of Medical Examiners, 807 F.2d 453, 456-57 (5th Cir. 1987) quoting *Concerned Citizens of Vicksburg v. Sills*, 567 F.2d 646, 650 (5th Cir. 1978).

The Supreme Court has expressly refused to abstain under *Younger* where "[n]o state proceedings were pending against" the federal plaintiffs. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975). As the Court noted in *Steffel v. Thompson*, 415 U.S. 452 (1974), "when no state proceeding is pending . . . considerations of equity, comity and federalism have little vitality." *Id.* at 462. In its most recent decision, *Pennzoil Co. v. Texaco, Inc.*, the Court reiterated the importance that state proceedings be ongoing for abstention to be appropriate:

> This concern mandates application of *Younger* abstention not only when the *pending* state proceedings are criminal but also when certain civil proceedings are *pending*. (Emphasis added.) *Id.* at 1526.

The thirty-day period in which Alleghany could have sought state judicial review of its order has long lapsed. This is irrelevant, however, to the issue of abstention. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 n. 22 (1975); *Allstate Insurance Co. v. Sabbagh*, 603 F.2d 228, 234 (1st Cir. 1979). The decision not to abstain is based on the precedents which preclude abstention on these facts rather than on the party's tactical decision to forego state review.

The issue here is whether the state court forum is the exclusive remedy afforded the complainant to litigate its constitutional challenge to the statute. As the Seventh Circuit noted:

> There must be something wrong with this argument, because if it were accepted it would prevent people from every challenging the constitutionality of state legislation in federal court. Every time someone brought a suit to have a state law declared unconstitutional the state would immediately file an action in state court to enjoin violation of the statute and then move the federal district court to stay or dismiss the federal suit, thereby forcing the federal plaintiff to litigate his federal claims by way of defense in the state court action.
>
> * * *
>
> [V]irtually no federal suit could ever be brought to challenge the constitutionality of a state statute. . . .

General Electric, 683 F.2d at 212.

The case at bar does not require abstention by the district court. Mandating abstention here would relieve federal courts of the adjudication of federal constitutional rights, "their native area of competence and jurisdiction." *Family Div. Trial Lawyers v. Moultie*, 725 F.2d 695 (D.C. Cir. 1984).

2. *Younger* applies when the federal plaintiff has violated the law or the state has initiated enforcement proceedings; Alleghany has not violated the law and the state has not initiated enforcement proceedings.

Alleghany initiated these proceedings by seeking the Indiana Insurance Commissioner's approval of its attempt to acquire control of St. Paul Indemnity. Alleghany has not violated the order of the Commissioner refusing its request nor has Indiana initiated enforcement

proceedings against Alleghany. Federal jurisdiction would not create an intrusion on the state's procedures.

The Seventh Circuit in *General Electric* explained that:

> *Younger* holds that the state's interest in enforcing its laws without interference from a federal court takes precedence over the federal claimant's interest in litigating his claim in a federal forum. But the federal plaintiffs in the present case did not violate state law, so the state could not have brought a penalty action against them. The state's interest in maintaining law and order through enforcement of its penal statutes was not impaired by the federal lawsuit and the principle of the *Younger* case is therefore inapplicable. It is not the order of the suits that is important to the *Younger* doctrine but whether a state statute has been violated and the violator is being sued in state court.

General Electric, 683 F.2d at 212.

Pennzoil likewise does not suggest a rejection of the requirement that either a law be violated or enforcement procedures be initiated by the state for abstention to be appropriate. While the pending state proceeding in *Pennzoil* was initiated by a private party against the federal plaintiff, the Court noted that the privately initiated state proceeding was part of "the process by which the state compels compliance with the judgments of its courts." *Pennzoil*, 107 S.Ct. at 1527.

Younger abstention as expanded by *Pennzoil* still requires the existence of:

(1) a state enforcement proceeding brought against a state defendant; and

(2) ongoing state proceedings of a judicial nature involving the federal plaintiff.

These necessary requirements for *Younger* abstention are missing in this case. The Court will not dismiss based on *Younger* principles.

B. *Burford* abstention.

Defendants also seek dismissal of the case under the Supreme Court's decision in *Burford v. Sun Oil Co. Burford* abstention is appropriate where federal jurisdiction would impermissibly disrupt the uniform application of a complicated state regulatory scheme. *Colorado River Water Cons. Dist. v. U.S.*, 424 U.S. 800, 815 (1976). The Court in *Burford* determined that abstention was appropriate because of "the actual nonlegal complexities in the case; the "sheer quantity of exception cases" and the role of the Texas courts as "working partners in creating a regulatory system for the oil industry." *Burford* at 323, 324, 326. The Court was concerned about the "confusion of multiple review." *Id.* More recently the Court has maintained that *Burford* or any other abstention is inappropriate "merely because resolution of a federal question may result in the overturning of a state policy." *Zablocki v. Redhail*, 434 U.S. 374, 379, n.5 (1978).

1. *Burford* abstention is appropriate when state law issues exist within a complex state regulatory system; such issues do not exist here.

Burford applies to situations in which the federal court is being asked to decide complex issues of state regulatory law. *Burford* arose as a diversity action in

which interpretation of Texas gas and oil regulations was required. The Court ruled that abstention was proper, deferring to the greater state court expertise in the regulatory area and avoiding needless intrusion of the federal court into the state's uniform regulatory system.

State law is not at issue in this case. While Indiana (and all states) regulate insurance services to policy holders under the McCarron-Ferguson Act, 15 U.S.C. §§ 1011-1015, the Court is not being asked to analyze any unsettled or complex issues of Indiana insurance law. The constitutional issues raised by Alleghany will not require the Court to "immerse itself in the technicalities of the state's [administrative] scheme." *Izzo v. River Edge*, 843 F.2d 765, 769 (3d Cir. 1988).

Burford abstention, thus, cannot be invoked merely because the validity of a state regulatory statute is at issue. *See Zablocki*, 434 U.S. at 379 n. 5 (1978).

2. *Burford* abstention is most appropriate when the state regulatory legislation designates a specific court for review of the administrative decision; none is designated here.

In *Burford*, the Texas legislature had designated a specific court to review administrative decision of the railroad commission. *Burford*, 319 U.S. at 326-327. Federal intervention would have undermined the authority of the designated courts and squandered the specialized expertise of those courts.

At times, the failure to designate a specific court for review of a state regulatory system has proven fatal to attempts to invoke *Burford* abstention. For example, the

Seventh Circuit declined to abstain on *Burford* grounds in *Board of Education v. Bosworth*, 713 F.2d 1316 (7th Cir. 1983) in part because the "adjudication of issues raised by the policy is not entrusted to a specialized tribunal." *Id.* at 1320.

Ind. Code § 27-1-23-12(a) does not specify that review of decisions of the insurance commissioner is restricted to a specific Indiana state court. Rather, the statute directs complainants to the general review of any state court as provided under the Indiana Administrative Adjudication Act (Ind. Code § 4-21.5-5-6).

Abstention under *Burford* here would be inappropriate because no complex issues of state regulatory law are involved and the state has not created specific review courts for decisions of the Insurance Commissioner regarding acquisition of insurance holding companies.

III. Conclusion

It is well recognized that "[a]bstention, from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River*, 424 U.S. at 813. When, as in this case, (1) there is no pending administrative or judicial proceedings; (2) the plaintiff has violated no law and the state has initiated no enforcement proceedings; (3) no state law issues must be decided within a complex regulatory system; and (4) the state has not designated a specific court for review, abstention is not called for and would unnecessarily contract federal jurisdiction.

Accordingly, for all the foregoing reasons, the Court hereby DENIES defendants' motion to dismiss plaintiff's complaint.

Dated this 30th day of January, 1989.

/s/ William E. Steckler
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
April 5, 1990
Before
Hon. Richard A. Posner, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Edward Dumbauld, Senior District Judge*

No. 89-1655 Alleghany Corporation, Plaintiff-Appellant, v. Robert D. Haase, Commissioner of Insurance of the State of Wisconsin, Defendant-Appellee, and St. Paul Companies, Inc. and St. Paul Fire and Casualty Insurance Co., Intervening Defendants-Appellees.	Appeals from the United States District Courts for the Western District of Wisconsin and for the Southern District of Indiana. No. 88 C 368 – Barbara B. Crabb, *Judge.*
Nos. 89-2055, 89-2056 Alleghany Corporation, Plaintiff-Appellee, v. John J. Dillon, Commissioner of Indiana Department of Insurance, Defendant-Appellant, and St. Paul Companies, Inc. and St. Paul Fire and Casualty Insurance Company, Intervening Defendants-Appellants.	No. 88 C 561 – William E. Steckler, *Judge.*

* Hon. Edward Dumbauld, of the Western District of Pennsylvania, sitting by designation.

Order

Less than a week after we issued our decision, the Eighth Circuit decided two parallel cases involving Alleghany's challenge to the state insurance holding company statutes – decided them opposite to, but apparently unaware of, our decision. *Alleghany Corp. v. McCartney*, No. 89-1241 (8th Cir. Feb. 27, 1990); *Alleghany Corp. v. Pomeroy*, No. 89-5033 (8th Cir. Feb. 27, 1990). We are not persuaded to abandon our position, but the emphasis which the opinions place on *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), prompts us to add this brief note on that case, which we cited only in passing in our original opinion.

The state brought suit in *Huffman* to close down a pornographic theater. It obtained a judgment in state court, and the theater owner did not appeal, but instead brought a suit in federal court to enjoin the enforcement of the state statute and thus the closing of the theater. The Supreme Court held that *Younger* abstention was proper in these circumstances. Indeed it was. The theater owner had violated the state statute, and if you violate a state statute and the state prosecutes you (not necessarily by means of a criminal proceeding) in state court, you must stay there. That is *Younger* in a nutshell. It is not this case, since Alleghany has violated no state law, and since the state has not proceeded against it in state court. Alleghany applied for a license and was turned down. It did not engage in the activity for which it had sought the license, and therefore did not expose itself to an enforcement proceeding. It challenged the licensing statute. It was not required by *Younger* or any other doctrine to file that challenge in state court.

The defendant-appellant, John J. Dillon III, filed a petition for rehearing and suggestion of rehearing en banc on March 7, 1989. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing and suggestion for rehearing en banc is DENIED.

TEXT AND EXHIBITS TO INDIANA'S REQUEST TO VACATE

* * *

The State of Indiana through John J. Dillon III, Commissioner of the Indiana Department of Insurance, by counsel, hereby moves this Court to vacate all judgments, orders and decisions previously entered in this action.

The grounds for this motion are that there is no longer a case or controversy between the Alleghany Corporation and St. Paul or the State of Indiana, and this action has become moot. In support of this Motion, attached hereto, as Exhibit A, is a copy of the Stipulation for Dismissal Without Prejudice filed in the United States District Court, Souther[n] District of Indiana, Indianapolis Division, in Cause No. IP 88-561-C.

The grounds for this Motion are also more fully stated in the Memorandum in Support of Motion to Vacate which is filed simultaneously with this Motion and is hereby incorporated into this Motion by reference.

WHEREFORE, the State of Indiana through John J. Dillon III, Commissioner of the Indiana Department of Insurance, prays the Court grant its motion and vacate all judgments, orders and decisions previously entered in this action.

* * *

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ALLEGHANY CORPORATION,

Plaintiff,

vs.

Cause No. IP 88-561-C

JOHN J. DILLON, Commissioner of Indiana Department of Insurance, THE ST. PAUL COMPANIES, INC., and ST. PAUL INDEMNITY INSURANCE COMPANY,

STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

Defendants.

Plaintiff Alleghany Corporation and Defendant The St. Paul Companies, Inc. have compromised and settled their dispute which led to the filing of this lawsuit challenging the constitutionality of the Indiana Insurance Holding Company statute on May 12, 1988. Alleghany no longer proposes to acquire 10 percent or more of the outstanding stock of The St. Paul Companies, Inc., thereby eliminating the circumstances that led to the filing of the above-captioned lawsuit.

Based upon the foregoing settlement, IT IS HEREBY STIPULATED AND AGREED by and among Alleghany Corporation, The St. Paul Companies, Inc., St. Paul Indemnity Insurance Company and John J. Dillon, through their respective counsel, that this action and all claims asserted herein may be dismissed without prejudice as moot, without cost or disbursements to any party.

IT IS FURTHER STIPULATED AND AGREED, that the Court may execute the Order of Dismissal Without Prejudice, a copy of which is attached hereto, without further notice to any party.

[Date and Signature Lines]

* * *

The State of Indiana has filed its Motion to Vacate Judgment and Decision of This Court. This Memorandum supports that Motion.

ISSUE PRESENTED

Whether this Court is required to vacate all prior judgments, decisions and orders in this action.

STATEMENT OF THE CASE

In this action, the plaintiff, Alleghany Corporation sought to challenge the constitutionality of the insurance holding company statutes of Indiana and Wisconsin, so as to enable it to acquire the St. Paul Companies, Inc., an insurance holding company.

On February 21, 1990, this Court held that abstention by the federal district courts would not be appropriate in this action. *Alleghany Corp. v. Haase*, 896 F.2d 1046 (7th Cir. 1990). Indiana's petition for rehearing and suggestion of rehearing *in banc* was denied on April 5, 1990.

Subsequent to the denial of the petition for rehearing and suggestion of rehearing *in banc*, Alleghany terminated its corporate takeover attempt, and all parties stipulated to dismissal of this action. (See, Exhibit A to

the Motion to Vacate Judgment and Decision of this Court.)

ARGUMENT

THIS COURT IS REQUIRED TO VACATE ALL PRIOR JUDGMENTS, ORDERS AND DECISIONS IN THIS ACTION.

A.

Vacation is required whenever a case or controversy ceases to exist, thereby rendering an action moot.

The fundamental principles applicable to the States' motion to vacate were succinctly stated in *Deakins v. Monaghan*, 484 U.S. 193, 108 S.Ct. 523, at 528 (1988):

> Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants. [Citations omitted.] It is not enough that a controversy existed at the time the complaint was filed, and continued to exist when review was obtained in the Court of Appeals. [Citation omitted.] In the case now before us, respondents state that they no longer seek any equitable relief in federal court. Because there no longer is a live controversy between the parties over whether a federal court can hear respondents' equitable claims, the first question on which certiorari was granted is moot.

(footnotes omitted.)

The rationale for the doctrine that vacation of a judgment or decision is required in a case that has become moot is that such a judgment or decision should not be accorded *res judicata* or collateral estoppel effect where

the initial controversy could not be litigated to a final resolution. *United States v. Munsingwear, Inc.*, 340 U.S. 36, at 38-39 (1950).

This Court has said that:

> [T]his disposition of moot appeals appears to be mandatory, at least for civil cases:
>
> "Where it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss."

United States v. Moehlenkamp, 557 F.2d 126, at 127 (7th Cir. 1977), *quoting Duke Power Co. v. Greenwood Co.*, 299 U.S. 259, at 267 (1936).

* * *

CONCLUSION

This controversy has become moot prior to Indiana's seeking a writ of certiorari from the United States Supreme Court. As shown above, this Court should vacate the judgments, orders and decisions entered in this case. Therefore, for the foregoing reasons, the State of Indiana prays the Court grant its Verified Motion to Vacate Judgment and Decision of This Court, vacate the judgments, orders and decisions entered in this case, and grant all other just and proper relief in the premises.

* * *

TEXT AND EXHIBITS TO WISCONSIN'S REQUEST TO VACATE

* * *

The State of Wisconsin through Robert D. Haase, its Commissioner of Insurance, supports Indiana's motion to vacate filed on or about July 13, 1990, and specifically requests vacation of all orders and judgments in Case No. 89-1655.

In support of its request, the State of Wisconsin relies upon the attached May 29, 1990 article from the New York Times and the attached July 9, 1990 status report of counsel for plaintiff Alleghany Corporation, indicating that Alleghany concedes its action to be moot and will soon file a motion for voluntary dismissal in the district court.

* * *

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May 29, 1990, Tuesday, Late Edition – Final

SECTION: Section D; Page 6, Column 6; Financial Desk

LENGTH: 213 words

HEADLINE: Stake Is Sold By Alleghany

BODY:

After nearly three years of seeking permission to raise its 8.9 percent stake in the St. Paul Companies, the Alleghany Corporation is selling its 4.4 million shares back to St. Paul for a market value of $260.7 million, plus $5 million in expenses.

St. Paul, a Minnesota insurer, has been fighting to prevent Alleghany, a New York financial-services concern, from raising its stake to 20 percent.

Alleghany, whose businesses include title insurance as well as property and casualty coverage, could have shown a portion of St. Paul's earnings on its own financial statements if it had acquired 20 percent.

As of Friday, four states had approved the increased stake and four had denied it, but the decisions were being appealed and there was no end in sight to the sparring.

The deal allows Alleghany to bow out with $30 million before taxes – more than it had going in.

Alleghany, which has been accumulating shares since 1987, paid an average of $52.43 for each its 4.4 million shares, or a total of $230.7 million. The settlement calls for St. Paul to pay Alleghany $59.25 a share, based on the closing stock price last Wednesday – a total of $260.7 million.

St. Paul has also agreed to reimburse Alleghany up to $5 million for expenses and to stop all litigation.

SUBJECT: STOCKS (CORPORATE)

ORGANIZATION: ST PAUL COS INC; ALLEGHANY CORP

* * *

July 9, 1990

HAND DELIVERY

Honorable Barbara B. Crabb
Chief Judge
United States District Court
Western District of Wisconsin
120 N. Henry Street
Madison, WI 53709

Re: *Alleghany Corporation v. Haase, Case No. 88-C-368-C*

Dear Judge Crabb:

I am writing to report on the status of this case. As you may recall, Alleghany and the proposed intervenor The St. Paul Companies have signed a settlement agreement. Alleghany will file a motion for voluntary dismissal on the grounds that the case is moot. I understand that the Attorney General will not oppose the motion.

Very truly yours,

QUARLES & BRADY

/s/ Erica M. Eisinger
Erica M. Eisinger

* * *

TEXT OF ALLEGHANY CORPORATION'S OPPOSITION TO INDIANA'S REQUEST TO VACATE

* * *

This Court has recently explained its reasons for *not* vacating decisions in cases that become moot by the parties' agreement after the district court renders a decision. *See Matter of Memorial Hospital*, 862 F.2d 1299, 1300 (7th Cir. 1988) (Easterbrook, J.) ("an opinion is a public act of the government, which may not be expunged by private action. . . . There is no common law writ of erasure."):

> When a clash between genuine adversaries produces a precedent . . . the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. The precedent, a public act of a public official, is not the parties' property. We would not approve a settlement that required us to public (or depublish) one of our own opinions, or to strike a portion of its reasoning.

Id. at 1302.

In any event, the precedent cited by the Commissioner applies only to *final* judgments. *See United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). The present motion involves an interlocutory order by the District Court in Indiana *denying* a motion to dismiss on abstention grounds and this Court's order affirming the District Court. *See F.T.C. v. Food Town Stores, Inc.*, 547 F.2d 247, 249 (4th Cir. 1977) (vacating final judgment but declining to vacate prior interlocutory order).

Accordingly, Alleghany Corporation respectfully urges the Court to follow its customary practice and deny the Indiana Commissioner's motion to vacate.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LYNN HINRICHS,

Plaintiff,

OPINION and ORDER

v.

90-C-0072-C

PATRICIA GOODRICH,
Secretary,
Wisconsin Department of
Health and Social Services,
Individually, and in her
official capacity,

Defendant.

This is a civil action brought pursuant to 42 U.S.C. §1983, in which plaintiff seeks a declaratory judgment and permanent injunction preventing defendant Goodrich from terminating plaintiff's benefits or refusing to grant benefits to plaintiff under the Aid to Families with Dependent Children program for plaintiff's failure to register for a work program for AFDC beneficiaries. Plaintiff contends that her decision to teach her children at home in accordance with her religious beliefs warrants her exemption from the AFDC work program. She challenges defendant's decision to reduce her benefits as a violation of her constitutional rights under the free exercise clause of the First Amendment, and the equal protection and due process clauses of the Fourteenth Amendment.

The matter is before the court on defendant's motion to dismiss on the ground that the pendency of state

judicial proceedings requires this court to abstain from adjudicating plaintiff's constitutional claims. *Younger v. Harris*, 401 U.S. 37 (1971). I conclude that, because the pending state court action is neither a prosecution of plaintiff for violation of a state statute nor the judicial review of an administrative proceeding brought against plaintiff to enforce a state law, it is not the type of proceeding to which the *Younger* doctrine applies. I conclude also that no exceptional circumstances exist that would permit this court to refuse to exercise jurisdiction over this case simply because a state action is pending. Therefore, defendant's motion to dismiss will be denied.

On a motion to dismiss, I am required to treat as true all of the well-pleaded allegations of the complaint and to draw all reasonable inferences in plaintiff's favor. I find that the complaint can be read as alleging the following.

ALLEGATIONS OF FACT

Plaintiff is a resident of Sauk County, Wisconsin. She has received monthly AFDC grants for the support of herself and her children. Defendant is the Secretary of the Wisconsin Department of Health and Social Services, the state agency responsible for the implementation and administration of the AFDC program in Wisconsin.

Plaintiff has six children. She believes that she has a responsibility to ensure that her children are taught "the word of God." She is impelled to teach her children in her home in a manner consistent with her religious beliefs because the public schools do not teach the word of God and there are no private religious schools accessible to her children.

Presently, plaintiff teaches her four youngest children at home from 8:30 a.m. until 4:00 p.m. Her program has been approved by the Wisconsin Department of Public Instruction pursuant to Wis. Stat. §§118.15(4) and 118.165(1).

Under state law, all persons receiving AFDC benefits must register with the Wisconsin Employment Opportunities Program, a work incentive plan. Wis. Admin. Code §HSS 201.19(1). Home-based teaching is not a permissible exemption, even if the educational program is approved by the Department of Public Instruction.

Plaintiff has requested that she be exempt from participation in the Employment Opportunities Program because she teaches her children at home full-time for religious reasons. Her request was denied on January 9, 1989. The Sauk County Department of Human Services issued a Notice of Decision indicating that plaintiff's AFDC benefits would decrease effective February 1, 1989 because of her failure to participate in the work program.

On January 23, 1989, plaintiff requested a fair hearing through the Wisconsin Department of Health and Social Services. On October 16, 1989, a hearing officer found both that plaintiff did not have good cause for her failure to comply with the Wisconsin Employment Opportunities Program and that she was not exempt from such participation. The hearing officer declined to adjudicate plaintiff's constitutional claims on the ground that they were beyond the authority delegated to her by statute. On October 25, 1989 plaintiff requested a rehearing on this decision, which was denied on November 29, 1989. That order constitutes a final decision of the department.

ADDITIONAL FINDINGS OF FACT

On December 21, 1989, plaintiff filed a petition in the Sauk County Circuit Court, asking for review of the Department of Human Services' decision, including its constitutionality. That petition is pending. On February 1, 1990, plaintiff filed this complaint.

OPINION

Defendant's motion to dismiss raises the question whether this court must abstain from adjudicating plaintiff's constitutional claims because of the pendency of the state court proceeding initiated by plaintiff to review the administrative denial of her request for an exemption from the AFDC work requirements. The parties agree that resolution of this issue involves interpretation of the *Younger* doctrine governing abstention; they disagree about the application of that doctrine to the particular facts of this case.

Although it is well settled that abstention by a federal court is the exception, not the rule, *New Orleans Public Service, Inc. (NOPSI) v. Council of New Orleans*, ___ U.S. ___, 109 S.Ct. 2506, 2518 (1989); *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the federalist nature of our system requires that the central government attempt to protect federal rights and yet "not unduly interfere with the legitimate activities of the states." *Younger v. Harris*, 401 U.S. at 44. "[A]bsent extraordinary circumstances" such as bad faith or harassment, a federal court should abstain from granting a request to enjoin a state criminal proceeding. *Id.* at 43-44.

The rationale rests primarily on the idea of "comity," that is,

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Id. at 44.

Using this rationale, the Supreme Court has extended the *Younger* principle to non-criminal proceedings. For example, the Court has held that abstention is required in cases involving certain quasi-criminal and civil proceedings where important state interests are at stake, *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (state-prosecuted obscenity abatement action in aid of and closely related to criminal prosecution); *Juidice v. Vail*, 430 U.S. 327 (1977) (civil contempt order analogous to criminal proceedings and necessary to safeguard regular functioning of state judicial system); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (civil proceeding by state to recover fraudulently obtained welfare benefits); *Moore v. Sims*, 442 U.S. 415 (1977) (state suit for child custody necessary to protect abused children) and *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (application of state's lien and bond provisions to litigant appealing an adverse civil judgment). The Court has also held *Younger* applicable to state administrative proceedings "in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claims." *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627

(1986) (proceeding to enforce state civil rights statute). *See also Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) (state bar disciplinary proceedings).

Defendant contends that this case comes within the expanded *Younger* doctrine. She argues that all of the elements mandating *Younger* abstention are present: 1) the pendency of a state proceeding of a judicial or quasi-judicial nature, 2) that implicates important state interests, and 3) provides an adequate opportunity for the federal plaintiff to raise constitutional challenges. *Middlesex Ethics Comm.*, 457 U.S. at 432.

With respect to the first element, defendant has shown that the hearing Wisconsin afforded to plaintiff was judicial in nature. Plaintiff was entitled to formal notice of hearing requirements, Wis. Stats. §227.44(2); she had the opportunity to present and to rebut evidence, §227.44(3); the hearing was transcribed, §227.44(6); and a written opinion was issued that could be appealed to state court.

With respect to the second element, Wisconsin has an important interest in enforcing its benefits scheme. *See, e.g., Trainor v. Hernandez*, 431 U.S. at 444 (state's interest in administering and "safeguarding [the] fiscal integrity" of its public assistance programs sufficient to warrant *Younger* application); *Kelly v. Lopeman*, 680 F.Supp. 1101, 1109 (S.D. Ohio 1987) (important state interest in administration of unemployment compensation scheme).

Last, defendant points out, correctly, that although plaintiff could not pursue her constitutional claims at the administrative hearing, the state court review process

provides her an opportunity to be heard on these claims. *See Dayton Christian Schools*, 477 U.S. at 626-27 (sufficient for *Younger* purposes that federal plaintiff had a full and fair opportunity to litigate constitutional claims for the first time in state court review of administrative proceeding).

It is true, as defendant argues, that the steady expansion of *Younger* suggests that federal courts are precluded from ever exercising jurisdiction over federal constitutional challenges to state laws or policies when a state administrative or judicial proceeding is pending. However, two recent cases have established that there are exceptions to this general rule. In *NOPSI v. City Council of New Orleans*, 109 S.Ct. 2506, the Supreme Court held that *Younger* does not require abstention in deference to a state judicial proceeding reviewing legislative or executive action. The Court noted that "[s]uch a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *Id.* at 2518. In *Alleghany Corp. v. Haase*, 896 F.2d 1046 (7th Cir. 1990), the court of appeals noted a second exception applicable to the present case. The court held that *Younger* was never intended to apply to

> cases in which the federal plaintiff has not violated state law, has not exposed himself to a state enforcement proceeding, is not a defendant in such a proceeding, but merely seeks to sweep away an illegal obstacle to his activities. *Illinois v. General Electric Co.*, [683 F.2d 206, 212 (1983)].

Id. at 1051. The court noted that, in such circumstances, comity is not a consideration because the state is not

dealing coercively or punitively with a malefactor to vindicate its important interests.

In *Alleghany*, the plaintiff insurance company was challenging a Wisconsin law that required approval of the state insurance commissioner for any acquisition of more than ten percent of the stock of an insurance company or the parent of an insurance company incorporated in Wisconsin. (Alleghany had brought the same challenge in federal courts in other states with similar laws.) Before filing its suit in federal court, plaintiff applied to the commissioner for permission to acquire twenty percent of the common stock of the St. Paul Companies, Inc., and was turned down. Rather than seeking review of the decision in state court as it was entitled to do, it sued the commissioner in federal court. Defendants' motion to dismiss under *Younger* was granted, but was reversed on appeal.

In holding that *Younger* abstention did not apply to Alleghany's federal court cases, the court of appeals focused on the doctrine's limited scope. Ordinarily, a state is entitled to proceed against violators of state law in its own courts or administrative agencies without interruption by a federal court. *Alleghany Corp.*, 896 F.2d at 1051. However, "*Younger* is confined to cases in which the federal plaintiff ha[s] actually or arguably violated a state statute, thereby exposing himself to an enforcement proceeding in state court. . . . " *Id* at 1053.

Although it would be inappropriate interference with a state's effort to proceed against wrongdoers for a federal court to intervene in an ongoing state administrative or judicial trial and appeals process, it would not be

inappropriate to exercise jurisdiction in circumstances in which the federal plaintiff could have initiated a federal suit against state officials in the first place, as Alleghany Corporation could have. *Id.* at 1052. The fact that the plaintiff attempts to resolve the dispute administratively is not a bar to obtaining federal court relief if the effort fails. "[T]he principles of federalism would be affronted rather than protected" if firms in Alleghany's position were deterred from applying for state approval before challenging the constitutionality of a statute in federal court. *Id.* at 1051.

Defendant argues that the *Alleghany* decision is inapplicable to the present dispute for a number of reasons: because Alleghany relinquished the corporate takeover pursuit occasioning its challenge to state law; because Indiana and Wisconsin are "taking steps" to vacate the Seventh Circuit's decision; and because the Court of Appeals for the Eighth Circuit upheld abstention in the *Alleghany* cases it heard. None of this is persuasive. Unless the Seventh Circuit decision is actually vacated, it remains controlling precedent in this jurisdiction.

The fact that Alleghany decided not to pursue its right to litigate the case further or decided to change its business strategy does not affect the precedential value of the case. Moreover, *Alleghany* did not express an entirely novel view of the law. Its holding was foreshadowed in *Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982), a federal court challenge to the Illinois Spent Fuel Act brought by the owner of a nuclear waste storage facility. In that case, the court of appeals rejected Illinois' efforts to invoke *Younger* as a bar to the exercise of federal court

jurisdiction simply because a state court suit was pending, noting that "[i]n every case that the state has cited the federal claimant had gone ahead and violated state law, thereby bringing into play the state's interest in redressing violations of its laws in its own courts." *Id.* at 213. General Electric avoided the *Younger* bar by choosing to sue first, rather than proceeding to bring nuclear waste into Illinois and waiting for the state to bring an enforcement action.

Defendant contends that if *Alleghany* is applicable, plaintiff satisfies its threshold criteria for abstention: she is a "malefactor" against whom the state is taking action. According to defendant, plaintiff violated state law by her refusal to register for the state job program, as evidenced by the state's subsequent decision to reduce her AFDC benefits.

This effort to cast plaintiff as a wrongdoer does not stand up to close examination. Plaintiff is not a malefactor. Defendant makes no allegation that plaintiff has engaged in any fraud in pursuing her right to receive benefits from the state. *Cf. Trainor v. Hernandez*, 431 U.S. 434 (*Younger* requires federal court abstention when plaintiff is subject of state proceedings to recover payments that had been obtained by allegedly fraudulent means). Plaintiff's home teaching of her children is not a violation of any state law; it is affirmatively permitted by state law. Wis.Stats. §§118.15(4) and 118.165(1). Plaintiff is simply challenging a condition imposed upon her if she wants to receive AFDC benefits. In this respect, she is seeking to do exactly what Alleghany was attempting: to challenge a statute imposing an allegedly unconstitutional requirement as a condition of obtaining a benefit.

In plaintiff's case the benefit is the receipt of AFDC payments; in Alleghany's case, it was the opportunity to purchase the stock of an insurance company.

Defendant cannot characterize as punishment the decision of the Wisconsin Department of Health and Social Services that plaintiff did not have good cause for exemption from the work requirements, any more than the insurance commissioner could characterize as punitive or coercive his ruling on Alleghany's request for permission to purchase insurance company stock.

There can be no interference with a *state prosecution* in this case, because no prosecution has ever been initiated against plaintiff. *Lemon v. Tucker*, 664 F.Supp. 1143 (N.D.Ill. 1987) (*Younger* did not require federal court to abstain from hearing challenges to constitutionality of procedures by which discrimination claims were handled by Illinois Department of Human Rights, where no state prosecutions had been brought against challengers). The relief plaintiff requests would not result in an injunction against a state court's efforts to enforce state law. Rather, she is seeking "to enjoin on federal grounds a state law whose meaning has been settled by state officials." *Alleghany Corp.*, 896 F.2d at 1052.

In short, there is no significant difference between the facts in *Alleghany* and those in this case. Like Alleghany Corporation, which was seeking approval of its acquisition efforts, plaintiff is seeking a benefit: the continued receipt of AFDC payments. Like Alleghany Corporation, plaintiff could have brought her suit challenging the state's administration of the AFDC work program

without first seeking an administrative hearing on her right to an exemption from the program's requirements.

The only remaining question is whether plaintiff must go forward with the pending state court action simply because she initiated it before she began this suit. If *Younger* applied, exhaustion would be required. "[F]or *Younger* purposes, the State's trial-and-appeals process is treated as a unitary system, and for a federal court to disrupt its integrity by intervening in mid-process would demonstrate a lack of respect for the State as sovereign." *NOPSI*, 109 S.Ct. at 2518. However, *Younger* does not apply, and "there is no general requirement of exhausting state judicial or administrative remedies before bringing a federal suit. . . . " *Alleghany Corp.*, 896 F.2d at 1050 (citing *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982) (no requirement under 42 U.S.C. §1983 to exhaust administrative remedies).

It is well settled that the existence of parallel proceedings in federal and state court does not mandate abstention by a federal court. *See, e.g., Colorado River*, 424 U.S. at 813, 817; *Evans Transportation Co. v. Scullin Steel Co.*, 693 F.2d 715 (7th Cir. 1982); *LaDuke v. Burlington Northern R. Co.*, 879 F.2d 1556 (7th Cir. 1989). Only exceptional circumstances justify a federal court's refusal to decide a case within its jurisdiction out of deference to the state courts. *Moses H. Cone Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 25 (1983); *Colorado River*, 424 U.S. at 813. *See also Illinois v. General Electric Co.*, 683 F.2d at 213 (case law does not support broad rule of abstention that whenever parallel state and federal suits are pending, federal suit must be stayed). *See also NOPSI*, 109 S.Ct. 2506 (federal plaintiff's filing of a state court action to

review ratemaking no barrier to maintenance of subsequently filed federal court action). I conclude that the pendency of the state court action does not bar this court's exercise of jurisdiction over plaintiff's challenge to the constitutionality of Wisconsin's administration of the AFDC program.

ORDER

It is ordered that defendant's motion to dismiss this case on abstention grounds is DENIED.

Entered this 30th day of November, 1990.

BY THE COURT:

/s/ Barbara B Crabb
BARBARA B. CRABB
District Judge

Supreme Court, U.S.
FILED
FEB 28 1991
OFFICE OF THE CLERK

(2)

No. 90-1010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOHN J. DILLON III and ROBERT D. HAASE,

Petitioners,

vs.

ALLEGHANY CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN E. TOBIN
Counsel of Record
MICHAEL J. WAHOSKE
JOHN G. RAINEY, JR.

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Attorneys for Respondent

QUESTION PRESENTED

Should this Court review two orders denying Petitioners' motions to vacate a non-final decision and order of the Court of Appeals, where a live controversy existed when the Court of Appeals decision was entered but the controversy became moot before Petitioners' time to seek review in this Court had elapsed?

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No. 90-1010

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN J. DILLON III and ROBERT D. HAASE,

Petitioners,

v.

ALLEGHANY CORPORATION,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of
Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Alleghany Corporation

informed this Court by letter dated

January 17, 1991 that "Alleghany has no current interest in the subject matters of the pending Petition and expressly waives its right to respond to the Petition . . . ." The Court nonetheless directed the Clerk to request a response from Alleghany, as set forth in a letter dated January 30, 1991 from Joseph F. Spaniol, Jr., Clerk.

STATEMENT PURSUANT TO RULE 29.1

Alleghany Corporation owns all the outstanding common stock of its direct subsidiaries. The Shelby Insurance Company ("Shelby"), an indirect subsidiary of Alleghany, has a class of preferred stock which is publicly held.

STATEMENT OF THE CASE

In 1988, Alleghany Corporation ("Alleghany") announced its intention to acquire up to 20 percent of the common stock of The St. Paul Companies, Inc. ("St. Paul"), a holding company incorporated in Minnesota with multiple insurance subsidiaries in several states. Insurance Commissioners (or comparable authorities) in 10 states, including Indiana and Wisconsin, each took the position that Alleghany could not purchase more than 10 percent of the outstanding St. Paul common stock without receiving their prior approval. [A-7].

When the Indiana and Wisconsin Commissioners denied Alleghany's applications for permission to purchase additional St.

Paul stock, Alleghany initiated federal court actions challenging the applicable Indiana and Wisconsin statutes on federal constitutional grounds. The United States District Court for the Western District of Wisconsin dismissed Alleghany's action under the abstention doctrine identified with Younger v. Harris, 401 U.S. 37 (1971), and Alleghany appealed. [A-33, 35]. The United States District Court for the Southern District of Indiana denied the Indiana Commissioner's motion to dismiss on Younger grounds, and the Court of Appeals agreed to review that interlocutory decision pursuant to 28 U.S.C. § 1292(b). [A-118].

The Indiana and Wisconsin appeals were consolidated for briefing and disposition. [A-28]. On February 21, 1990, the United States Court of

Appeals for the Seventh Circuit ruled that the federal courts were not required to abstain under the Younger doctrine, reversing the Wisconsin district court and affirming the Indiana district court. [A-5, 20]. In related appeals arising out of similar challenges to the applicable North Dakota and Nebraska statutes, the Eighth Circuit arrived at the opposite conclusion regarding Younger abstention on February 27, 1990. See Alleghany Corp. v. McCartney, 896 F.2d 1138 (8th Cir. 1990); Alleghany Corp. v. Pomeroy, 898 F.2d 1314 (8th Cir. 1990). [A-132].

Before any further proceedings on the merits in the district courts, Alleghany sold its St. Paul holdings to St. Paul at market plus an allowance toward Alleghany's legal expenses, and agreed

to discontinue the litigation and certain state administrative proceedings. [A-140-41]. The Indiana action was dismissed as moot on July 18, 1990; the Wisconsin action was dismissed as moot the next day. [A-115, 31].

The Indiana and Wisconsin Commissioners, respectively, filed motions in the Seventh Circuit on July 16 and 20, 1990, requesting that the Seventh Circuit vacate its non-final decision and order dated February 21, 1990 regarding Younger abstention. The Seventh Circuit denied those motions by orders dated July 19 and 23, 1990. [A-1, 3]. Petitioners seek review of the July orders.

SUMMARY OF THE ARGUMENT

Respondent Alleghany, which discontinued its efforts to acquire

additional St. Paul stock three months after the Seventh Circuit handed down its abstention decision, has no concrete interest in the subject matter of the pending Petition. Accordingly, there is no case or controversy with respect to Alleghany. The absence of a truly adverse party counsels against selecting this case for review.

REASONS FOR DENYING THE WRIT

This case is moot as to Alleghany, which has no concrete interest, pecuniary or otherwise, in the procedural issue raised by Petitioners: whether the rule stated in United States v. Munsingwear, 340 U.S. 36 (1950), imposes a "mandatory duty" on the court of appeals to vacate a non-final order in a matter that becomes moot before the time for

seeking review in this Court has elapsed. [Petition at 10].

Any discussion of the merits of Petitioners' argument in this Response would not reflect the views of an adverse party vigorously seeking to preserve the fruits of a lower court victory. However, since the Court directed the Clerk to request that Alleghany submit a Response to the Commissioners' Petition, it submits this Response, which is limited to a discussion of the procedural aspects of the case which may influence the Court's decision whether to grant review.

The most important procedural aspect, of course, is that no party except the Petitioners has any current interest in the outcome of the dispute. In many cases, the party who prevails in the lower courts in a case

that becomes moot on its way to this Court will have a concrete interest in the outcome of his adversary's motion to vacate. The Munsingwear case itself provides a clear example. Munsingwear, as the defendant below, had prevailed in an injunction action brought by the United States. Munsingwear therefore had a significant interest in preserving the collateral estoppel effect of the unvacated final judgment because a separate action for damages had been initiated by the United States arising out of the same conduct.

Unlike the respondent in the Munsingwear case, Alleghany does not expect that it will again be litigating with either Petitioner over the legal issue resolved by the Seventh Circuit. In some later case similar to Munsingwear a respondent

may come before this Court with an interest in preserving the unvacated lower court decision. Such a case would provide a better opportunity to review the question posed in the Petition.

Moreover, when Petitioners attempt to identify the "collateral consequences" which flow from the Younger abstention decision in this case, they cite only a district court opinion respecting the precedential value of the February 21, 1990 Seventh Circuit abstention decision. See Hinrichs v. Goodrich, No. 90-C-0072-C (W.D. Wis. Nov. 30, 1990) (reproduced in Appendix at A-145). The Hinrichs decision does not even mention collateral estoppel -- in stark contrast with the Munsingwear case, which this Court described as "a case which falls squarely within the

classic statement of the rule of res judicata . . . ." See Munsingwear, 340 U.S. at 58.

Finally, Petitioners assert that their primary concern is the lingering impact of a Seventh Circuit abstention analysis "that significantly erodes the ability of the states to have other kinds of cases or controversies decided in their own courts." [Petition at 11]. The materials in Petitioners' Appendix illustrate that the unvacated Seventh Circuit decision is not the true source of Petitioners' concern. The Seventh Circuit's February 21, 1990 decision, and the Wisconsin district court's decision in the Hinrichs case cited by Petitioners, recognized that the abstention decision in the present case "was foreshadowed" in prior Seventh Circuit decisions. See

Hinrichs at A-153; Alleghany Corp. v. Haase, 896 F.2d 1046, 1053 (7th Cir. 1990) (reproduced at A-19) (both citing Illinois v. General Electric Co., 683 F.2d 206 (7th Cir. 1983).

If Petitioners' actual concern, as they suggest, is with the Seventh Circuit's abstention holding and its possible "collateral consequences," that issue can be addressed in a more direct manner. The Hinrichs case itself may find its way to this Court. Because collateral estoppel was neither argued nor applied in the Hinrichs case, the abstention issue remains alive for eventual Supreme Court review. The issue ostensibly raised by the present Petition -- whether "[u]nder Munsingwear, the Seventh Circuit therefore had a mandatory duty to grant the states' request to vacate"

-- should await a case that more closely resembles Munsingwear, including the participation of an adversary who has an interest in whether the lower court's decision is vacated and the existence of an unvacated final judgment which has collateral effects that are clear rather than speculative.

CONCLUSION

Although Alleghany neither opposes nor seeks the issuance of a writ of certiorari to the Seventh Circuit to review its orders declining to vacate the February 21, 1990 abstention decision, cf. Sup. Ct. R. 15.1; Sup. Ct. R. 24.1(j), Alleghany respectfully submits that the absence of a live controversy and the absence of a final judgment with clear collateral estoppel effect should preclude review in this case. If review is granted, however, Alleghany respectfully requests that it be dismissed as a Respondent. Because the instant action no longer presents a live case or controversy as to Alleghany, Alleghany does not intend

to submit further briefs herein unless advised that it is required to do so.

Dated: New York, New York
February 28, 1991

Respectfully submitted,

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